(10)

No. 98-2060-CFH Title: Ronald D. Edwards, Warden, Petitioner
v.
Robert W. Carpenter

Docketed: June 24, 1999 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jun 22 1999	Petition for writ of certiorari filed. (Response due July 24, 1999)
	Jul 23 1999	Brief amicus curiae of Texas, et al. filed.
	Aug 4 1999	DISTRIBUTED. September 27, 1999
	Sep 10 1999	Response requested.
	Oct 8 1999	Brief of respondent Robert W. Carpenter in opposition filed.
	Oct 8 1999	Motion of respondent for leave to proceed in forma pauperis filed.
	Oct 19 1999	Reply brief of petitioner Ronald Edward, Warden filed.
	Oct 20 1999	REDISTRIBUTED. November 5, 1999
	Nov 8 1999	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 8 1999	Petition GRANTED. SET FOR ARGUMENT February 28, 2000. **********
	Nov 18 1999	Motion of respondent for appointment of counsel filed.
	Nov 23 1999	DISTRIBUTED. December 10, 1999 (page 4)
	Dec 13 1999	Motion for appointment of counsel GRANTED and it is ordered that J. Joseph Bodine, Jr., Esquire, of Columbus, Ohio, is appointed to serve as counsel for the respondent in this case.
	Dec 22 1999	Brief amici curiae of Texas, et al. filed.
	Dec 23 1999	Brief of petitioner Ronald D. Edwards, Warden filed.
	Dec 23 1999	Joint appendix filed.
	Dec 28 1999	Record filed.
	Dec 28 1999	Record filed.
	Jan 7 2000	CIRCULATED.
	Jan 21 2000	Brief of respondent Robert Carpenter filed.
	Feb 17 2000	Reply brief of petitioner Ronald Edwards, Warden filed.
	Feb 28 2000	ARGUED.

(1)

No. _____

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another habeas claim when the ineffective-assistance claim is itself procedurally defaulted.

PARTIES TO THE PROCEEDING

Petitioner is the warden of the Correctional Reception Center in Orient, Ohio.

Respondent is currently incarcerated at the Correctional Reception Center.

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In the Supreme Court of the United States

No. _____

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Ronald D. Edwards, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 163 F.3d 938. The opinion of the district court (Pet. App. 19a-38a) is unreported. The opinion of the Ohio court of appeals (Pet. App. 39a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1998. A petition for rehearing was denied on March 24, 1999. Pet. App. 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

***

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

INTRODUCTION

This petition presents an important question of federal habeas procedure on which the circuit courts of appeals are now divided. The question is whether the procedural default of an ineffective-assistance-of-counsel claim precludes that claim from serving as cause for the procedural default of other claims presented on federal habeas. In this case, the court of appeals acknowledged that the ineffective-assistance claim was itself procedurally defaulted, but nonetheless considered the merits of that claim, and concluded that it could serve as the cause for another procedural default. Pet. App. at 10a-11a. The court's consideration of the ineffective-assistance claim, notwithstanding the explicit recognition of its procedural default, is in direct conflict with the ruling of all other circuit courts of appeals on precisely the same issue.

Those other courts have held -- and properly so -- that ineffective assistance of counsel cannot serve as "cause" for the procedural default of another claim if the ineffective-assistance claim is itself procedurally defaulted. Moreover, the reasoning of these other courts is sound -- and the conflicting approach of the Sixth Circuit is unsound -- for one simple reason: in order to find that ineffective assistance of counsel caused the procedural default of some other habeas claim, a habeas court necessarily must reach the merits of the ineffectiveness claim *even though the State's courts have declined to do so* in light of the prisoner's procedural default of it. Only if a habeas claimant can show "cause and prejudice" for the procedural default of the ineffective-assistance claim would this procedural default be excused, *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and absent such a showing, the State's procedural rule ought to bar federal-court review of the claim.

Yet, in this case, the court of appeals never considered whether there was cause for the prisoner's default of his ineffective-assistance claim, believing it unnecessary to do so as long as the claim was exhausted in state court. Because this errant approach mistakenly overlooks the importance of subjecting procedurally defaulted ineffective-assistance claims to the same cause and prejudice analysis that applies to all other federal habeas claims, and because it stands as an outlier next to the proper analysis applied by other federal courts, we respectfully ask the Court to grant certiorari in this case.

STATEMENT

Respondent Robert W. Carpenter pled guilty to the crimes of aggravated murder and aggravated robbery in an Ohio trial court in 1990. Those charges stemmed from the murder and robbery of a 73-year-old woman, who had been bludgeoned to death with a blunt object in her Columbus, Ohio home in October 1988.

Carpenter entered his guilty pleas in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970), and a three-judge panel found Carpenter guilty after the prosecution presented a statement of the facts. After conducting a sentencing hearing, the three-judge panel sentenced Carpenter to life imprisonment with parole eligibility after thirty years.

Carpenter appealed (through counsel), alleging that the evidence presented at the sentencing hearing established that he should have received a sentence of life imprisonment with parole eligibility after twenty years rather than thirty. The court of appeals affirmed, however, *see* 1991 WL 35009 (March 12, 1991), and Carpenter did not appeal this decision to the Ohio Supreme Court.

The following year, Carpenter filed a *pro se* petition in the state trial court, asking that court to vacate his convictions and sentences in light of his trial counsel's alleged ineffectiveness. He also argued that he had been coerced into entering his guilty pleas, and cited other unspecified constitutional violations. The trial court dismissed the petition on June 18, 1992, finding it too conclusory to state any valid grounds for relief under O.R.C.

2953.21, Ohio's post-conviction relief statute. The state court of appeals affirmed the dismissal, *see* 1992 WL 361815 (December 3, 1992), and the Ohio Supreme Court declined to review the case. *State v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this petition. It was issued in response to the Ohio Supreme Court's decision in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), in which the court held that, in Ohio, a claim of ineffective assistance of appellate counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals.

The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days -- starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal -- to raise such ineffective-assistance claims. Some Ohio appellate courts, including the one that had decided Carpenter's original direct appeal in 1990, gave those criminal defendants, like Carpenter, whose original state-court appeals had already been resolved before the new rule took effect on July 1, 1993, an additional 90 days from *that* date to file ineffective-assistance-of-appellate-counsel claims under the new rule.

On July 15, 1994, Carpenter (through new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. Carpenter alleged that his appellate counsel in his original

appeal in 1990 had provided ineffective assistance by failing to challenge the sufficiency of the evidence presented by the prosecution at his guilty plea hearing. Ohio law has long permitted criminal defendants who have pled guilty to aggravated murder to challenge -- in a direct appeal -- the sufficiency of the evidence supporting their convictions. *See State v. Taylor*, 30 Ohio App. 2d 252, 285 N.E.2d 89 (8th Dist. 1972).

On September 29, 1994, the state court of appeals dismissed Carpenter's Rule 26(B) ineffective-assistance-of-appellate-counsel claim, finding that he had missed the 90-day window for filing such a claim once Rule 26(B) took effect on July 1, 1993. Pet. App. 39a-42a.[1] Carpenter's reason for filing a late request to reopen his direct appeal -- that he was not aware in 1990 that he could challenge the sufficiency of the evidence on direct appeal -- was not "good cause" for missing the 90-day deadline in 1993, said the court of appeals.

---

[1] The Ohio Supreme Court later ruled that even those defendants who filed Rule 26(B) applications within 90 days after July 1, 1993 had to show "good cause" for not seeking appellate relief earlier under the predecessor provision of Rule 26(B). *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995). Carpenter's Rule 26(B) application therefore would have been late even had he filed it within the first three months after the rule took effect, though the court of appeals applied a more lenient standard in 1993 that essentially gave persons like Carpenter a 90-day grace period after the new rule took effect on July 1, 1993. In any event, Carpenter's July 15, 1994 application for reopening of his direct appeal was untimely even under the court of appeals' more lenient approach.

Carpenter appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application for reopening. *State v. Carpenter*, 74 Ohio St. 3d 408, 659 N.E.2d 786 (1996).

On May 3, 1996 (shortly after the effective date of AEDPA), Carpenter filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged (1) insufficiency of the evidence supporting his plea and sentence; (2) ineffective assistance of appellate counsel; and (3) the denial of a meaningful opportunity for state-court review of his federal claims because of Ohio App. R. 26(B)'s time limit for raising ineffective-assistance-of-appellate-counsel claims.

In its opinion, Pet. App. 19a-38a, the district court determined that Carpenter had procedurally defaulted on his sufficiency-of-the-evidence claim by failing to raise it in his direct appeal, and the court found that this default was an adequate and independent state ground that foreclosed federal-court review of the claim. *Id.* at 28a. Likewise, the district court found that Carpenter had failed to comply with Ohio's procedural rule (App. Rule 26(B)) for raising ineffective-assistance-of-appellate-counsel claims. *Id.* at 29a. However, in a ruling that the Sixth Circuit did not later address on appeal, the district court concluded that Ohio appellate courts had not set a uniform statewide procedure for interpreting the "good cause" exception to Rule 26(B)'s 90-day time limit. *Id.* at 30a.[2] For that reason, said the district

[2] Should the Court grant this petition and reverse the court of appeals' decision (which rested on other grounds and did not address this point), a remand would be appropriate to allow the court of appeals to consider this part of the district court's holding.

court, Carpenter's procedural default in raising his ineffective-assistance claim did not pose an adequate and independent state ground barring federal-court review of the claim, *id.* at 29a-31a, and after reviewing that ineffective-assistance claim, the district court found it meritorious. *Id.* at 37a.

And, according to the district court, that claim of ineffective assistance could not only be reviewed in federal court as a habeas claim itself, but it also could serve as "cause" for Carpenter's procedural default on the sufficiency-of-the-evidence claim as well. *Id.* at 31a. As for "prejudice" from the allegedly deficient performance of Carpenter's first appellate lawyer, the district court found that Carpenter's sufficiency claim was "an issue of obvious strength," *id.* at 37a, was one that "a reasonably knowledgeable criminal defense attorney should at least [have] be[en] familiar with," *id.* at 36a, and showed "potential viability," *id.* at 37a, had it been raised on direct appeal. The district court, agreeing with Carpenter on his second claim for habeas relief, therefore granted a writ of habeas corpus, conditioned on a prompt reopening of his direct appeal in the state appellate court, during which he would be permitted to challenge the sufficiency of the prosecution's evidence against him. The district court declined to address the first and third claims in Carpenter's habeas petition.

Carpenter and the warden (hereinafter, "the State") both appealed. The court of appeals held that the "cause" (here, ineffective assistance) for the procedural default of

some other habeas claim (here, insufficiency of the evidence) is not itself "subject[] to a procedural default analysis before it may constitute cause." Pet. App. 8a. Carpenter, according to the court of appeals, had exhausted his ineffective-assistance-of-appellate-counsel claim by filing his Rule 26(B) application for reopening the direct appeal in 1994. "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 10a. The critical inquiry, however, according to the court of appeals, was simply whether Carpenter had *exhausted* his ineffective-assistance claim (by trying to raise the claim under Rule 26(B)), not whether the claim itself was *procedurally defaulted* (because it was raised too late).

> While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on procedural default, so long as the claim was presented to the state courts and it is exhausted.

Id. at 10a-11a.

Finding that Carpenter's original appellate counsel was indeed ineffective by failing to raise the sufficiency-of-the-evidence argument in Carpenter's direct appeal, *id.* at 15a, the court of appeals held that (1) counsel's ineffectiveness had caused the default of the sufficiency claim, and (2) the ineffectiveness had prejudiced Carpenter. *Id.* at 16a. The district court had reached the right result by the wrong route, said the court of appeals, for the district court "was not required to determine whether [the ineffective-assistance claim] was procedurally defaulted, but merely whether it had been exhausted." *Id.* at 16a, n.13. Because the ineffective-assistance claim was clearly exhausted, the district court could have jumped right to the question of whether Carpenter's counsel had been constitutionally ineffective, said the court of appeals, and on that latter issue, the court of appeals agreed that he had been.

The court of appeals therefore affirmed the district court's issuance of the writ of habeas corpus. But rather than ordering that Carpenter's direct appeal in state court be reinstated, as the district court had directed, the court of appeals ordered the district court to send Carpenter's case back to the original state trial court for a new hearing on Carpenter's guilt or innocence.

REASONS FOR GRANTING THE PETITION

Like so many of this Court's decisions interpreting and applying the statutes and rules that govern federal habeas claims, "[t]his is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 766 (1991), for as was true in that case, this one too "concerns the respect that federal courts owe the States and the States' procedural rules when

reviewing the claims of state prisoners in federal habeas corpus." *Id.*

Though Robert Carpenter, the habeas petitioner in this case, procedurally defaulted on both a sufficiency-of-the-evidence claim (because he never raised it on direct appeal) and an ineffective-assistance-of-appellate-counsel claim (because he raised it too late under Ohio's procedural rules), the court of appeals has now revived both claims, and his case is headed back to square one in the state trial court. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 730-31. Review by this Court is therefore warranted, particularly where, as here, the decision of the court of appeals on this issue runs counter to the approach followed by every other court to consider the question.

1. No one disputes that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As the Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may

nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as prescribed by *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of some other federal habeas claim. *See Murray*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that a *procedurally-defaulted* ineffective-assistance claim may serve as cause for some other procedural default, and surely *Murray*, a case on which the court of appeals purported to rely, Pet. App. at 8a-10a, says nothing of the sort. Though the court of appeals saw no need even to resolve whether Carpenter had defaulted on his ineffective-assistance claim, that court did note that "Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 10a. Once the ineffective assistance claim "is exhausted," said the court of appeals, it "may be utilized as cause, . . . even if the state court has denied the claim based on a procedural default." *Id.* at 11a. Not only is that approach not supported by this Court's decision in *Murray*, it in fact runs counter to the Court's longstanding directive that habeas claims be both exhausted *and not procedurally defaulted*. *See Justus v. Murray*, 897 F.2d 709, 714 (4th Cir. 1990) ("*Murray* stands for the proposition that before an ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court and not be procedurally defaulted. Any other reading of *Murray* eviscerates *Wainwright*.").

All a federal habeas petitioner need do now in Ohio -- and in the other States in the Sixth Circuit that likewise enforce procedural rules for raising ineffective-assistance-of-counsel claims[3] -- is (1) default on an ineffective-assistance claim (most likely, by missing the deadline for filing it), (2) make a vain attempt to comply with the procedural rule by filing an out-of-time ineffective-assistance claim in the state courts (thereby satisfying the exhaustion requirement, according to the court of appeals), and then (3) file a federal habeas petition blaming the allegedly ineffective state-court trial or appellate lawyer for a whole host of procedural defaults in the state-court criminal trial and direct appeal. If a federal court finds that an ineffective lawyer caused those other procedural defaults, all of those long-since-defaulted claims can come springing back to life, even though the prisoner failed to comply with the State's rules for raising the ineffectiveness claim itself.

In practical terms, the decision below has wiped out Ohio's statute of limitations for raising ineffective-assistance claims in state court, for no such claim is ever filed too late, according to the court of appeals. Even had Carpenter waited for several more years before filing his ineffective-assistance claim -- thereby further flouting the State's time limit for raising such claims under Ohio App. Rule 26(B) -- he could still have headed to federal court and relied on his procedurally defaulted ineffective-assistance-of-appellate-counsel claim to revive his similarly defaulted sufficiency-of-the-evidence claim, according to the approach now adopted

[3] Ky. R. Crim. P. 11.42(10) (three-year time limit); Tenn. Code Ann. 40-30-202(a) (one-year time limit).

by the court of appeals. Though Ohio has tried to bring a sense of finality to ineffective-assistance claims by setting and enforcing a reasonable time limit on raising such claims, the State is now left with no finality at all.

2. The decision of the court of appeals has created a square and direct conflict on the question presented in this petition. Five other circuits (the Second, Fourth, Seventh, Eighth and Eleventh) have adopted the exact opposite approach to the one chosen by the Sixth Circuit, and indeed we have found no other decisions that agree with the Sixth Circuit's analysis of this important issue of habeas procedure. *See, e.g., Pisciotti v. Washington*, 143 F.3d 296, 300 (7th Cir. 1998) ("A petitioner can establish cause for a procedural default by demonstrating that he received ineffective assistance of counsel. . . . However, the ineffective-assistance claim must have been presented to the state courts in the manner required by state procedural rules."); *Reyes v. Keane*, 118 F.3d 136, 139-40 (2nd Cir. 1997) ("Although Reyes's claim of ineffective assistance is deemed exhausted, we nonetheless find that, by defaulting on that claim in state court, Reyes forfeits that claim on federal habeas review, even though the claim is brought as cause for another procedural default."); *id.* at 140 ("a petitioner may not bring an ineffective assistance claim as cause for a default when that ineffective assistance claim itself is procedurally barred"); *Hill v. Jones*, 81 F.3d 1015, 1030 (11th Cir. 1996) ("we conclude *[Murray v.] Carrier* and the rest of the Supreme Court's jurisprudence on procedural default dictate that procedurally-defaulted claims of ineffective assistance cannot serve as cause to excuse a default of a second claim"); *id.* at 1031 ("*Carrier* requires a claim of ineffective assistance be both exhausted and not defaulted in state court

before it can be asserted as cause"), *cert. denied*, 519 U.S. 1119 (1997); *Harris v. Lockhart*, 948 F.2d 450, 452 (8th Cir. 1991) ("appellant cannot use ineffective assistance of counsel to establish cause for procedural default because his claims were neither raised in a timely manner in the state court nor addressed on the merits by the state court"); *Justus v. Murray*, 897 F.2d 709, 713 (4th Cir. 1990) ("just because claims have been exhausted, as appellant's ineffective assistance claims were, it does not necessarily mean that review of those claims will not be precluded by the procedural default rule, as review of appellant's claims is"). Several district courts have likewise adopted the same approach as all other circuit courts (except the Sixth Circuit in this case). *See, e.g., Maciel v. Carter*, 22 F. Supp.2d 843, 854 (N.D. Ill. 1998) ("Maciel's only allegation of 'cause' is his ineffective assistance of counsel claim. . . . Maciel procedurally defaulted his ineffective assistance claims. Therefore, Maciel cannot rely on ineffective assistance of counsel as the 'cause' of his procedural default."); *Szczuka v. Tucker*, 3 F. Supp.2d 58, 63 (D. Mass. 1997) ("the procedurally defaulted ineffective assistance of counsel claim cannot constitute cause for the other procedurally defaulted claims because the state court never treated the ineffective assistance claim on the merits.").

In ruling that a federal habeas court may consider a procedurally defaulted ineffective-assistance-of-counsel claim as cause for the procedural default of another habeas claim, the court of appeals has departed from the uniform course set by other lower courts. And that decision likewise runs counter to "the important interest in finality served by state procedural rules." *Coleman*, 501 U.S. at 750. Far from respecting the State's procedural rule in this case, the court of

appeals has ignored it and rendered it meaningless. And though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now carry no water in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of the right to effective assistance of counsel. Such an expansive view of the federal habeas power threatens the finality of state criminal proceedings, undercuts the States' authority to enforce their procedural rules, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 730. The decision thus merits review.

3. In sum, the court of appeals' published decision now stands as a clear precedent -- and, we believe, an erroneous one -- for the lower courts to follow in our circuit, even as courts elsewhere follow a much different course. Moreover, the question presented in this petition is properly and squarely before the Court -- and the case is therefore an appropriate vehicle for the Court to address and resolve it -- precisely because the court of appeals' ruling on that issue was the *sole* basis for the judgment below. The question presented is of great concern to the States, going as it does to the heart of the States' power to enforce procedural rules governing how and when state prisoners must present federal constitutional claims in state court before seeking federal habeas review. Because the lower courts are now clearly divided on the question, review in this Court is warranted to resolve this pressing conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

v.

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-00447—Joseph P. Kinneary, District Judge.

Argued: April 28, 1998

Decided and Filed: December 18, 1998

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge. Respondent Gary C. Mohr, a warden for the State of Ohio, appeals from the district court's grant of a conditional writ of habeas corpus to petitioner Robert W. Carpenter. The district court held that Carpenter's appellate counsel on direct appeal in state court was ineffective for failing to raise a sufficiency of the evidence claim, and ordered that the state court reinstate Carpenter's appeal within ninety days or a writ of habeas corpus would be issued. Carpenter cross-appeals from the district court's decision not to decide his remaining habeas claims. For the

reasons stated herein, we affirm the district court's determination that Carpenter established cause for procedurally defaulting his insufficient evidence claim. However, we remand the case for issuance of a writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing.

I.

On the evening of October 5, 1988, Warren Young found the dead body of his adoptive mother Thelma Young,[4] a 73-year-old woman, in her Columbus, Ohio home. She had apparently been bludgeoned to death with a blunt object and repeatedly cut and stabbed with a sharp object and a screw driver. All of the cash kept in her purse and bedroom dresser had been removed. The next day, on October 6, 1988, Carpenter, Warren Young's close friend, telephoned 9-1-1 and stated that he had information concerning the crime. He informed the police officers investigating the crime that while he was attending to his car at a gas station, three men forced him at gun point to the rear of his car, and drove the car to Young's home. At Young's home, two men took Carpenter's shirt and glasses. According to Carpenter, the three men then forced Carpenter to knock on the door, and when Young answered pushed Carpenter inside. Carpenter asserted that one of the men went with Carpenter into Young's bedroom where he forced Carpenter to dump the contents of Young's purse on the bed. That man then took the money from Young's purse and forced Carpenter into the bathroom. While Carpenter was in the bathroom, Young was murdered. After the men left, Carpenter exited the bedroom, removed a screw driver from Young's mouth, and rolled Young's body onto its back. He retrieved his glasses and shirt that were lying near the body, picked up the screw driver and left the house. The next day he called 9-1-1.

[4] All references to "Young" are to Thelma Young.

Although the police initially considered Carpenter a witness, he was eventually arrested. The police retrieved a number of items of evidence connecting Carpenter to the crime scene, including pieces of Carpenter's clothing with blood from the victim, as well as a screw driver found in his car. J.A. at 308. Carpenter, however, consistently maintained that although he was present during the murder, others actually committed the crime.[5]

On October 14, 1989, a Franklin County Grand Jury returned an indictment charging Carpenter with one count of aggravated murder with a death penalty specification under Ohio Rev. Code § 2903.01, and one count of aggravated robbery under Ohio Rev. Code § 2911.01. Carpenter initially entered a general plea of not guilty to the charges, but as a result of a plea agreement, waived his right to a jury trial and changed his plea to a conditional guilty plea pursuant to the procedure approved in *North Carolina v. Alford*, 400 U.S. 25 (1970), in which he pleaded guilty while still maintaining his innocence. During the culpability hearing concerning his guilty plea, held before a three-judge panel, Carpenter asserted his innocence and stated that he pleaded guilty only to avoid the death penalty. J.A. at 253-55. The prosecution then recited its statements of facts concerning the charges, which the parties agreed that the defense would neither admit nor deny. J.A. at 257. No witnesses were called during the culpability hearing and no testimony or exhibits were admitted other than the prosecution's statement concerning the crime. After hearing the prosecution's statement, the three-judge panel

[5] While in jail prior to his culpability hearing, Carpenter apparently confessed to a state psychiatrist a slightly different version of events. In this version, Carpenter still maintained that he was an unwilling participant when three men forced their way into Young's home and killed her; yet admitted that the men were known to him and that he had voluntarily accompanied the men who he claimed had gone to Young's home in order to retrieve a drug debt that Young's son owed them. Carpenter also admitted to being forced to strike Young with the screw driver after she was already dead. J.A. at 613-17.

accepted Carpenter's plea and found beyond a reasonable doubt that Carpenter had committed the crimes charged in the indictment, including the death penalty specification that Carpenter was the principal offender and committed the murder during the commission of an aggravated robbery. The three-judge panel then conducted a mitigation hearing to determine Carpenter's sentence and subsequently sentenced Carpenter to a life term of imprisonment with no possibility of parole for thirty years on the aggravated murder count, and to a concurrent term of ten years minimum to twenty-five years maximum on the aggravated robbery count.

On October 9, 1990, Carpenter (through counsel) appealed his convictions and sentence to the Ohio Court of Appeals, assigning only one error.[6] The Court of Appeals affirmed the convictions and sentence, and Carpenter did not appeal this decision to the Ohio Supreme Court.

On March 13, 1992, Carpenter applied for post-conviction relief and filed a pro se petition to vacate or set aside his convictions and sentence asserting four errors.[7] The trial court dismissed the petition on June 18, 1992, finding no substantive grounds for relief. Carpenter then appealed this decision, again pro se, to the Ohio Court of Appeals asserting two errors.[8] After the state's response, Carpenter filed an additional

[6] Carpenter's counsel argued that the evidence offered in mitigation established that the only reasonable sentence was a sentence of life with possibility of parole after twenty years rather than thirty. J.A. at 61-69. He did not challenge the sufficiency of the evidence.

[7] The claims were: (1) ineffective counsel; (2) improper charging of offenses and improper sentences imposed; (3) *Alford* plea obtained illegally by coercion and threats; and (4) constitutional violations. J.A. at 85-86. He also requested production of documents to support his petition.

[8] On that appeal Carpenter argued: (1) the trial court committed reversible error in dismissing his petition to vacate sentence and failing to grant him an evidentiary hearing on his claims; and (2) the trial court erred in not ordering the clerk to convey requested documents to him.

assignment of error pro se.[9] Carpenter then obtained court-appointed counsel and on September 30, 1992, filed another brief asserting one assignment of error.[10] On December 3, 1993, the Ohio Court of Appeals affirmed the lower court decision dismissing Carpenter's petition to vacate, finding that the conclusory statements made in support of his petition were insufficient to state a ground for post-conviction relief. Carpenter (again pro se) appealed to the Ohio Supreme Court which dismissed the appeal on April 14, 1993.

On July 15, 1994, after retaining yet another counsel, Carpenter filed an application to reopen his direct appeal in the Ohio Court of Appeals pursuant to Ohio R. App. P. 26(B), alleging that his original appellate counsel was ineffective because he had failed to raise the sufficiency of the evidence claim on direct appeal. This was Carpenter's first opportunity to raise the claim of ineffective assistance of appellate counsel because under Ohio law such claims cannot be raised in post-conviction proceedings, but must be raised either in a motion for reconsideration in the court of appeals through an application to reopen direct appeal, or in an appeal to the Ohio Supreme Court. *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992). The Ohio Court of Appeals dismissed Carpenter's application on September 29, 1994, determining that Carpenter had failed to show good cause for filing his application beyond the ninety-day period required under Ohio R. App. P. 26(B)(1).[11] Carpenter subsequently appealed this

[9] The trial court's refusal to allow him requested documents violated his rights under the Ohio Constitution. J.A. at 113-17.

[10] The trial court erred by summarily dismissing Carpenter's petition for post-conviction relief without affording him an evidentiary hearing to substantiate his grounds for relief.

[11] Ohio Appellate Rule 26(B) provides in pertinent part that a defendant may appeal from a judgment of conviction or sentence based on a claim of ineffective assistance of appellate counsel by filing an application to reopen the direct appeal "in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the

decision to the Ohio Supreme Court, which on January 31, 1996 affirmed the Ohio Court of Appeals' decision in a one sentence per curiam opinion relying on the authority of *State v. Reddick*, 647 N.E.2d 784 (Ohio 1995).

On May 3, 1996, Carpenter filed a habeas corpus petition with the United States District Court for the Southern District of Ohio. He alleged: 1) insufficiency of the evidence to support his plea and subsequent sentence; 2) ineffective assistance of appellate counsel; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state courts through the application of Ohio Appellate Rule 26(B). On March 12, 1997, the district court entered judgment for Carpenter on his ineffective assistance of appellate counsel claim and ordered that a writ of habeas corpus conditionally issue unless the Ohio Court of Appeals reinstated Carpenter's direct appeal from the state conviction within ninety days. The district court did not rule on Carpenter's sufficiency of the evidence and lack of meaningful relief claims, deeming them moot. The State timely appeals from this judgment and Carpenter cross appeals from the district court's denial of relief on his two other grounds, as well as the district court's choice of remedy.

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applicant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1). Rule 26(B) also provides that an application will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio R. App. P. 26(B)(5).

Carpenter's direct appeal was journalized on March 21, 1991, two years before the effective date of this rule, and therefore the court treated the effective date of the rule, July 1, 1993, as the start date for the time requirement. Carpenter filed his application to reopen the direct appeal on July 15, 1994, more than ninety days after the effective date of the rule.

II.

This court reviews *de novo* a district court's disposition of a petition for a writ of habeas corpus, but nonetheless reviews the district court's factual findings for clear error. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997); *see also West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996); *Warner v. United States*, 975 F.2d 1207, 1217 (6th Cir. 1992).

We first address Carpenter's cross-appeal because the resolution of that appeal in Carpenter's favor would render the State's appeal moot. Carpenter argues that the district court erred on several grounds by failing to reach the merits of his sufficiency of the evidence claim.[12] First, he argues that the district court erroneously applied the four part *Maupin* test for state procedural default.[13] The district court determined initially that Carpenter's sufficiency of the evidence claim was waived for purposes of habeas review because he failed to assert it in state court making it barred there due to res judicata. *See State v. Perry*, 226 N.E.2d 104, 105 (Ohio 1967) (applying res judicata to bar claim of ineffective assistance of counsel in state court); *State v. Sowell*, 598 N.E.2d 136, 140 (Ohio Ct. App. 1991) (same). Neither party contests this ruling. The district court then determined that in order to hear the claim on

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[9] Carpenter also argues that the district court erred in failing to reach the merits of his claim that Ohio Appellate Rule 26(B) precludes a petitioner from the opportunity for meaningful litigation of his or her federal claims in state court. We find that our resolution of Carpenter's sufficiency of the evidence claim renders this claim moot.

[10] Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit utilizes a four part analysis when a state argues that a federal habeas claim has been procedurally defaulted in state court. This court determines: 1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; 2) whether the state courts actually enforced the state procedural rule; 3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so 4) the petitioner must establish cause for his failure to follow the rule and prejudice by the alleged constitutional error. *Id.*

federal habeas review, it must decide if Carpenter had asserted "cause and prejudice" for the state procedural default. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) ("If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error."); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As "cause" for his failure to raise the sufficiency of evidence claim in state court on direct appeal, Carpenter asserted, as he is permitted to do, the ineffective assistance of his appellate counsel. *See Gravley*, 87 F.3d at 785 ("Attorney error that amounts to ineffective assistance of counsel can constitute 'cause.'"). The district court then determined that because a federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the claim was itself presented to the state court as an independent claim, it was required to first determine whether Carpenter's ineffective assistance of appellate counsel claim had been preserved for habeas corpus review. J.A. at 817. The court next applied the *Maupin* test for procedural default to the ineffective assistance of appellate counsel claim, and determined that this claim had not been waived because the state procedural bar (Ohio R. App. P. 26 (B)) was not an adequate state ground upon which to deny federal habeas relief. Thus, the court determined that the ineffective assistance of Carpenter's appellate counsel could be utilized to establish cause for Carpenter's failure to raise the sufficiency of evidence claim on direct appeal, and after considering the claim, determined that Carpenter's counsel was constitutionally ineffective. The district court, however, declined to decide the sufficiency of the evidence claim, finding that its resolution of the ineffective assistance of appellate counsel claim, i.e. by ordering the state court to reinstate Carpenter's appeal, rendered the sufficiency of the evidence claim moot.

Carpenter argues that the district court erred initially by

determining that the cause for his procedural default of his sufficiency of evidence claim (here ineffective assistance of appellate counsel) must itself be subjected to a procedural default analysis before it may constitute cause. He argues that the Supreme Court's decision in *Murray v. Carrier*, 477 U.S. 478 (1986), only imposed an exhaustion requirement on the cause asserted by the habeas petitioner in connection with the procedural default of the primary habeas claim. We agree.

Carpenter is correct in that the district court erroneously conflated the exhaustion requirement with the procedural default or waiver rule. The two inquiries are analytically distinct. *See Meeks v. Bergen*, 749 F.2d 322, 324 (6th Cir. 1984) (noting that "the question of whether a respondent is barred from litigating in a federal habeas corpus proceeding constitutional claims that were forfeited before the state court is distinct from the issue of exhausted state remedies"); *see also Engle v. Isaac*, 456 U.S. 107, 125-26 n. 28 (1982) (finding that waiver is separate from the question of exhaustion and exhaustion simply requires a petitioner to exhaust those remedies "available in the court of the State"). In *Murray*, the Court held that an ineffective assistance of appellate counsel claim must merely be presented to the state courts as an independent claim, before it can be used to establish cause for the state procedural default of a separate claim. *Murray*, 477 U.S. at 488-89. In so doing, the Court stated:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause -- a question of federal law-- without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his

> ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation' and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

Id. (citations omitted). A careful reading of *Murray* makes clear that the Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented.

"Th[is] exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Significantly, "[t]o exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion." *Id.* at 883; *see also Rudolph v. Parke*, 856 F.2d 738, 739 (6th Cir. 1988) ("It is settled law in this circuit that a constitutional claim which is presented to the state courts, regardless of whether they address and dispose of it, will satisfy the exhaustion requirement."). Furthermore, exhaustion applies even if a claim was procedurally defaulted in state court, because in such cases there are no longer remedies available for the petitioner to exhaust. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Engle*, 456 U.S. at 125-26 n.28 (1988).

Here, the state expressly conceded that Carpenter exhausted his ineffective assistance of appellate counsel claim. J.A. at 16. Carpenter presented his ineffective assistance of appellate counsel claim in his state court petition to reopen his direct appeal, and thus provided the state court with the first opportunity to determine the claim. When this petition was denied, he then appealed that denial to the Ohio Supreme Court. True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay. Carpenter, however, has exhausted all available state remedies for the claims. While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted. Put another way, the Supreme Court simply requires exhaustion of the ineffective assistance of counsel claim in order for it to constitute cause. The claim must be presented to the state courts, and all available remedies foreclosed, or the exhaustion requirement will not be met. Once all available remedies in state court are precluded and the state court may no longer pass on the claim, however, it is exhausted and may be utilized as cause. There is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim. *Cf. Meeks*, 749 F.2d at 325-26 (finding that a petitioner's habeas claims were exhausted when the petitioner joined the claims in an application for delayed appeal in state court, even though the claim was ultimately denied in state court due to a procedural

default).

We do note that, although our review of the issue has not found a large number of cases directly addressing the issue, the Second and Seventh Circuits have considered the issue in slightly different contexts. *See, e.g., Reyes v. Keane*, 118 F.3d 136, 139-40 (2d Cir. 1997) (habeas petitioner who fails to raise a claim of ineffective assistance of trial counsel in state court may not present that claim as cause for procedurally defaulted habeas claim); *Lemons v. O'Sullivan*, 54 F.3d 357, 360-61 (7th Cir. 1995) (same). Those cases are distinguishable from the present case, for in both cases the petitioner completely failed to raise the ineffective assistance claim in state court. Here, however, Carpenter raised the claim in the primary avenue available to him under Ohio law (application to reopen his direct appeal). Hence, Carpenter provided the state court with the first opportunity to address the claim, although the court declined to do so on a procedural basis. Therefore, we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray*. Under a broad reading of *Murray*, we note that it probably would be insufficient, as the Seventh and Second Circuits have held.

Therefore, we conclude that the district court erred by finding that before it could consider whether the ineffective assistance of Carpenter's appellate counsel established cause for the state procedural default of Carpenter's sufficiency of the evidence claim, it must first determine whether the ineffective assistance of appellate counsel claim was itself procedurally defaulted, rather than simply exhausted. Principles of comity do not require placing a procedural default analysis on claims asserted as cause. We believe that the exhaustion requirement mandated by *Murray* is sufficient, and ensures that the state court has the first opportunity to hear such claims. Moreover, as noted earlier, a petitioner will be effectively "punished" for procedurally defaulting the ineffective assistance claim by only being able to assert it as cause for a procedural default and not being permitted to assert it as an independent habeas claim.

The Supreme Court in *Murray* did not implement a procedural default requirement for claims asserted as cause, and until it does, we see no reason to engraft such a requirement on our own.

Once shown to be exhausted, the ineffective assistance of appellate counsel could be properly utilized as cause for the default of the sufficiency of the evidence claim, and the court was then required to continue the cause and prejudice analysis by determining whether the ineffective assistance of appellate counsel rose to the level of a constitutional violation, thereby satisfying the cause element for excusal of state procedural default. *See, e.g., Rust*, 17 F.3d at 161 (noting that attorney error may constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir. 1993). In order for ineffective assistance of appellate counsel to rise to the level of a Sixth Amendment violation, the performance of Carpenter's counsel: 1) must be deficient, in that it is below an objective standard of reasonableness, and 2) this deficient performance must have prejudiced his appeal. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985); *cf. also Strickland*, 466 U.S. at 688, 694; *West*, 73 F.3d at 84. A petitioner may establish prejudice by demonstrating that there is a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Carpenter argues, and the district court determined below, that his appellate counsel's failure to raise the sufficiency of the evidence on direct appeal, and only raising the significantly weaker claim that Carpenter was entitled to parole after twenty rather than thirty years, was constitutionally deficient.

Under normal circumstances a plea of guilty precludes the defendant from attacking the sufficiency of the evidence under Ohio law. *See State v. Hertz*, 135 N.E.2d 781 (Ohio Ct. App. 1954)(per curiam). Ohio law, however, requires that a party who pleads guilty to aggravated murder appear before a three-judge panel which must "examine the witnesses, determine

whether the accused is guilty of aggravated murder . . . and pronounce sentence accordingly." O.R.C. § 2945.06. Challenges to the sufficiency of the evidence are therefore expressly permitted on aggravated murder charges. *See State v. Taylor*, 285 N.E.2d 89, 96 (Ohio Ct. App. 1972); *see also State v. Leasure*, No. 1755, 1992 WL 174663 (Ohio Ct. App. July 22, 1992) (challenging the sufficiency of the evidence after guilty plea). In addition, the Ohio Supreme Court has recently affirmed that a guilty plea conviction supported only by the prosecution's recitation of the facts "does not satisfy the evidence requirements of Crim. R. 11 and R.C. 2945.06." *State v. Green*, 689 N.E.2d 556, 559 (Ohio 1998). In *Green*, a unanimous court held that during a culpability hearing on a guilty plea, the three-judge panel must examine witnesses, and in that case found that because Green's conviction was not supported by any evidence other than the prosecution's factual recitation, it must be reversed and remanded for a new trial. *Id.* at 559-60.

As an additional point, we note that although *Green* was decided after Carpenter raised his claims in state court, application of the rule pronounced in *Green* to this case does not present a retroactivity problem under *Teague v. Lane*, 489 U.S. 288, 301 (1989). The Ohio Supreme Court's decision in *Green* does not constitute a "new rule," nor does it create a new constitutional right as contemplated by *Teague*. Indeed, *Green* relies upon the plain language of O.R.C. § 2945.06, which has been in effect since 1991, and the Ohio Supreme Court's decision in *State v. Post*, 513 N.E.2d 754, 756 (Ohio 1987). Moreover, *Green* specifically notes the "inherent dangers" in relying solely on the prosecutor's recitation of the facts considering the well-settled principle that "a statement of facts by a prosecutor does not constitute evidence." *Green*, 689 N.E.2d at 559 (citing *State v. Davis*, 581 N.E.2d 1362, 1373 (Ohio 1991)). Finally, although *Green* was a state law ruling, it certainly has constitutional import, for due process requires that a state criminal conviction be supported by sufficient and adequate evidence on the elements of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979). Consequently,

application of the standards most recently articulated in *Green* neither "breaks new ground [nor] imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

The district court in the case *sub judice* noted that a reasonably knowledgeable criminal defense attorney would have known that the sufficiency of the evidence could be challenged following a guilty plea to aggravated murder, and that the specific facts of Carpenter's case warranted a sufficiency of the evidence challenge on appeal. We agree. First, since *Taylor* in 1972, it has been well-established law in Ohio that the sufficiency of the evidence may be challenged on the appeal of an aggravated murder conviction. Second, Carpenter never wavered from his protestations of innocence, only entering a conditional guilty plea, and only in order to avoid the death penalty. Finally, the only information before the panel was the prosecution's recitation of the facts, which as noted previously is not evidence. *See Green*, 689 N.E.2d at 559; *Davis*, 581 N.E.2d at 1373. Here, no witnesses were called as required by Ohio Rev. Code § 2945.06, and no independent evidence was submitted. Carpenter's case mirrors that of *Green* where guilt was established only through the prosecution's recitation of the facts, and the conviction was reversed on appeal.[14] Therefore, the facts of Carpenter's case clearly supported a sufficiency of the evidence challenge and it is unfathomable why Carpenter's counsel failed to raise a

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[14] A prosecution's recitation of the facts may be considered evidence with the explicit consent of the defense. *See Post*, 513 N.E.2d at 766. The Ohio Court of Appeals on Carpenter's application to reopen his direct appeal seemed to imply that his counsel's decision to neither admit nor deny these facts was such explicit consent, but did not rely on that basis for denying Carpenter's application. J.A. at 186-87. In light of the fact that defense counsel in *Green* had made no such stipulation, the Ohio Supreme Court expressly declined to reconsider *Post*. *Green*, 689 N.E.2d at 559. Neither party in this case thoroughly briefed the issue on appeal, and the district court did not address it below. Upon remand, the district court may rule on the issue.

sufficiency of the evidence claim on appeal. We find that his complete failure to raise such an integral part of Carpenter's case and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective. *See, e.g., Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (noting that although tactical decisions do not make out a claim for ineffective assistance, the failure to raise a significant constitutional claim may); *Clemmons v. Delo*, 124 F.3d 944, 953-54 (8th Cir. 1997) (finding ineffective assistance of appellate counsel where appellate counsel failed to raise obvious claim on direct appeal); *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead bang winner" claim on appeal was constitutionally ineffective assistance of appellate counsel even though other strong claims were raised); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (noting that petitioner may establish ineffective assistance of appellate counsel if he shows that counsel ignored significant obvious issue while pursuing weaker claims); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (finding ineffective assistance of appellate counsel when counsel failed to raise substantial claim but instead raised weaker one); *Matire v. Wainright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (same). Thus, Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal and because, as noted, the claim is clearly a viable one, he has also established prejudice from his counsel's failure to raise the claim.[15] Accordingly, the ineffective assistance of Carpenter's appellate counsel excused his failure to raise the sufficiency of the evidence claim on direct appeal in state court.[16] *Cf. Gravley*, 87 F.3d at 786.

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[15] Although we find that Carpenter has established prejudice from the failure to raise the sufficiency of the evidence on appeal, in that there is a reasonable probability that the result of the proceedings may have been different, we do not decide the claim here.

[16] Although reaching the same conclusion as this court, that ineffective assistance of appellate counsel excused Carpenter's failure to raise the sufficiency of the evidence claim in state court, the district court's analysis was different. The district court found below that the ineffective assistance of counsel claim may constitute cause for the state procedural default of the sufficiency of the evidence claim, even though it too had been procedurally defaulted in state court, because the state court rule utilized as a basis for barring the ineffective assistance of appellate counsel claim, Ohio R. App. P. 26(B), was not an adequate and independent state ground to foreclose relief. The district court found that the good cause requirement of the rule had been inconsistently applied in the state courts. While we agree that it appears that the good cause requirement has not been uniformly applied in state court, we need not reach the issue because of our ruling that in determining whether the ineffective assistance of appellate counsel could constitute cause for the default of the sufficiency of the evidence claim, the district court was not required to determine whether it was procedurally defaulted, but merely whether it had been exhausted. Our analysis of whether the ineffective assistance of appellate counsel claim rose to the level of a constitutional violation, however, follows that of the district court below.

Upon establishing that Carpenter had sufficiently asserted cause for procedural default of his insufficiency of the evidence claim, the district court determined that the appropriate remedy would be to issue the writ conditioned upon the state court reinstating Carpenter's direct appeal. We agree that a conditional writ is the appropriate remedy in this case. We conclude, however, that because the state court has already made its position concerning Carpenter's appeal relatively clear, ordering the state court to reinstate the direct appeal would simply prolong resolution of this case. If and when the state court denied the appeal, Carpenter would simply file a successive habeas petition reasserting his claims and again requesting federal review. Considering that Carpenter's initial complaint was that his culpability hearing went awry, we find that the more appropriate resolution here is for the district court to issue the writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law.

III.

For the foregoing reasons, we **AFFIRM** the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but **REMAND** the case to the district court for the imposition of a remedy consistent with this opinion. Our resolution of the cross-appeal in Carpenter's favor renders moot the State's direct appeal of the district court's grant of a conditional writ of habeas corpus to Carpenter.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

v.

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

[Filed: March 24, 1999]

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-96-447

ROBERT CARPENTER, Petitioner

v.

GARY MOHR, WARDEN, Respondent.

[Filed: March 12, 1997]

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the instant petition, Respondent's return of writ, Petitioner's traverse, and the exhibits of the parties.

On October 14, 1989, Petitioner was indicted by the Franklin County Grand Jury for one count of aggravated murder, with a death penalty specification, and one count of aggravated robbery. Represented by two attorneys, Petitioner entered *Alford* pleas to both counts on March 29, 1990, whereafter a mitigation hearing was held to determine Petitioner's sentence. Petitioner received a life sentence for the aggravated murder, and a concurrent ten (10) to twenty-five (25) year sentence for the aggravated robbery.

Represented by an assistant Franklin County public defender, Petitioner appealed to the Court of Appeals for the Tenth Appellate District. He raised the following assignment of error:

> The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty full years of imprisonment.

On March 12, 1991, the Court of Appeals affirmed the judgment of the trial court. It does not appear from the record that Petitioner appealed the Court of Appeals' decision to the Supreme Court of Ohio.

However, on March 13, 1992, Petitioner filed a *pro se* post-conviction action in the trial court. He raised the following issues for review:

1. Ineffective Counsel,
2. Improper charging or offenses, and improper sentences imposed;
3. Illegal plea of guilty obtained by coercion, and inappropriate information and improper dialogue with the court pursuant to Rule 11; and
4. Constitutional violations.

On June 18, 1992, the trial court dismissed Petitioner's action on the ground that he had "shown no substantive grounds for relief."

Petitioner filed a *pro se* appeal to the Court of Appeals for

the Tenth Appellate District, and raised the following assignments of error:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGEMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

Thereafter, counsel was appointed to assist Petitioner with his appeal. Counsel filed an additional brief on September 30, 1992, wherein he raised the following argument.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUMMARILY DISMISSING APPELLANT'S PETITIONS FOR POST CONVICTION RELIEF UNDER OHIO REVISED CODE § 2953.21 (C) AND (E).

On December 3, 1992, the Court of Appeals affirmed the judgment of the trial court on the ground that "[t]he petition filed by defendant is insufficient to state a claim for post-conviction relief under R.C. 2953.21."

Petitioner then filed a *pro se* appeal to the Supreme Court of Ohio. He raised two propositions of law:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

On April 14, 1993, the Supreme Court of Ohio dismissed Petitioner's appeal.

Represented by new counsel, Petitioner filed an application in the Court of Appeals to reopen his direct appeal on the basis of ineffective assistance of appellate counsel. Petitioner's new attorney assigned as error appellate counsel's failure to raise the following issue:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEA FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

On September 29, 1994, the Court of Appeals denied

Petitioner's request to reopen his direct appeal on the basis of Petitioner's failure to show good cause why he could not have filed the motion within the ninety-day period required by Ohio R. App. P. 26(B)(1).

Petitioner sought leave to appeal to the Supreme court of Ohio. On June 14, 1995, the Supreme Court accepted jurisdiction, and set deadlines for the filing of merit briefs. Petitioner raised the following propositions of law:

1. The applicability of the good cause exception to the ninety day time period for the filing of an application to reopen an appeal in a criminal case under App. R. 26(B)(1) must be evaluated by balancing the interests under the facts of a particular case so as to give effect to the overriding concern that a defendant have a meaningful opportunity required by the due process cause of the fifth and fourteenth amendments to the federal constitution to challenge his conviction.

2. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider whether the defendant possessed actual knowledge during the ninety day period of the existence of the grounds for appeal not raised by his appellate counsel, or had reason to question the constitutionality of his conviction on grounds not raised by his appellate counsel. The court of appeals must also consider whether it was appellate counsel's own deficient performance that resulted in the reopening at an earlier time, or whether defendant deliberately by-passed the

orderly procedures in the rules of appellate procedure.

3. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider the effect that the passage of time between the journalization of the appellate judgment of the appellate judgment and the filing of the application for reopening will have on the state's ability to defend against defendant's challenge. The absence of material prejudice to the state weights in favor of a finding of good cause.

On January 31, 1996, the Supreme Court of Ohio affirmed the Court of Appeals' decision without opinion.

This federal habeas corpus action ensued. Petitioner seeks a writ of habeas corpus based on the following claims for relief:

Ground One: The State of Ohio failed to produce sufficient evidence to support Petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting Facts: Following Petitioner's *Alford* plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability

hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

Ground Two: Petitioner was denied the effective assistance of counsel in his direct appeal from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting Facts: In his direct appeal from his conviction, Petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived Petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

Ground Three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his

rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting Facts: The state appellate courts arbitrarily rejected Petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception [to] the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, Petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

Respondent argues in the first instance that Petitioner's first and second claims are procedurally barred. Respondent argues in the alternative that all of Petitioner's claims lack merit The Court will first address Respondent's argument that Petitioner's first and second claims are procedurally barred.

I.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to

dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986), *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*.

The first part of the *Maupin* test requires the Court to determine whether Petitioner violated a procedural rule. The failure to raise a claim on direct appeal that appears on the face of the record constitutes a procedural default under Ohio's

doctrine of *res judicata*. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Perry*, 10 Ohio St. 2d 175 (1967). In the instant case, Petitioner's first claim for relief, *i.e.*, that the State failed to produce sufficient evidence of Petitioner's guilt, addresses an alleged error which would appear on the face of the record. Accordingly, Petitioner's failure to raise this claim on direct appeal constitutes a procedural default under Ohio's doctrine of *res judicata*.

The state courts were never given an opportunity to enforce the procedural rule in this instance due to the nature of Petitioner's procedural default. Consequently, the Court deems the second part of *Maupin* test to have been satisfied.

The Court further finds that the procedural rule is an adequate and independent state ground upon which to deny relief. The doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981); *State v. Perry*, 10 Ohio St. 2d 175 (1967). Further, the doctrine of *res judicata* serves the state's interests in finality, and in ensuring that claims are adjudicated at the earliest possible opportunity.

The Court having found that Petitioner's first claim for relief is subject to a procedural default, and that this procedural rule provides an adequate and independent ground for denying relief, it is incumbent upon Petitioner to demonstrate both cause for his procedural default, and actual prejudice resulting from the alleged error. As cause for the failure to raise his sufficiency of the evidence claim on direct appeal, Petitioner asserts ineffective assistance of appellate counsel. Given that

"[a] federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the ineffectiveness claim was itself presented to the state courts as an independent claim," this Court must first determine whether Petitioner's ineffective assistance of appellate counsel claim has been preserved for federal habeas corpus review.

II.

Applying the *Maupin* analysis therefore, this Court must first determine whether a procedural rule applies to Petitioner's claim, and if so, whether Petitioner violated that rule. In Ohio, claims of ineffective assistance of appellate counsel must be raised in an application to reopen the direct appeal within ninety days of the Court of Appeals' judgment entry. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); Ohio R. App. P. 26(B). Untimely applications may be filed only by leave of the court of appeals upon a showing of good cause for the delay[17] Petitioner filed an application to reopen his direct appeal on the basis of ineffective assistance of appellate counsel on July 15, 1994. In an effort to comply with the Ohio R. App. P. 26(B), Petitioner alleged as cause for his failure to file this application within the allotted time period that he had relied on appellate counsel's expertise, and was himself unaware at the time of his direct appeal that his attorney could have raised a sufficiency of the evidence claim following his guilty plea. The Court of Appeals rejected this allegation, and dismissed Petitioner's application for the failure to show cause for the untimely filing.

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[17] In *State v. Reddick*, 72 Ohio St. 3d 88 (1995), the Supreme Court of Ohio held that the 90-day limit and good cause exception imposed by the July 1, 1993 amendment to Ohio R. App. P. should apply to cases which predated that amendment.

The Supreme Court of Ohio affirmed the Court of Appeals' decision. Thus, the first and second parts of the *Maupin* test would appear to be satisfied.

The third part of the *Maupin* test requires this Court to determine whether the state procedural rule is an adequate and independent ground for precluding relief. To be "independent," the procedural rule at issue, as well as the state court's reliance thereon, must rely in no part on federal law. *See Coleman v. Thompson*, 501 U.S. 722, 732-33 (1991). To be adequate, the state procedural rule must be firmly established and regularly followed by the state courts. *Ford v. Georgia*, 498 U.S. 411 (1991). "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id.* at 423 (quoting *James v. Kentucky*, 466 U.S. 341, 348-351 (1984); *see also Barr v. City of Columbia* 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964). It is difficult, in light of the foregoing, for this Court to find that the procedural rule in this case was "firmly established and regularly followed" by the state courts at the time that Petitioner filed his delayed motion for reconsideration.

A review of Ohio appellate court decisions reveals that at the time that Petitioner filed his application, there are was no firmly established state procedure for enforcing the "good cause" requirement for applications that were not filed within the ninety day period. For instance, it appears that some Ohio appellate courts apply a standard under which "good cause" will almost never be found. *See State v. Owens*, 1996 WL 146097, No. 84 C.A. 131 (Ohio App. Dist. 7 Mar. 29, 1996). Other Ohio appellate courts employ a standard under which

"good cause" will almost always be found. *See State v. Nitenson*, 1994 WL 679894, No. 91 C.A. 796 (Ohio App. Dist. 4 Feb. 24, 1994). Still other Ohio appellate courts appear to avoid the "good cause" issue, and proceed instead to the merits of the applicant's claim(s). *See State v. Holland*, 1994 WL 142735, No. 92AP-853 (Ohio App,. Dist. 10 Apr. 21, 1994).

The Supreme Court of Ohio has offered little guidance. This Court could not find a single appeal wherein the Supreme Court of Ohio found "good cause" for the untimely filing of an application for delayed reconsideration brought pursuant to Ohio R. App. P. 26(B). In *State v. White*, 72 Ohio St. 3d 91, 92-93 (1995), the applicant sought review by the Ohio Supreme Court of the Court of Appeals' decision that the applicant had failed to show good cause for the untimely filing of his applicant for reconsideration. The applicant's attorney, an Assistant Ohio Public Defender, had attached an affidavit to the application explaining that he had been unable to file the application sooner due to his heavy workload, and that the defendant was in no way responsible for the delay. The Ohio Supreme court affirmed the Court of Appeals' determination that the explanation did not suffice as "good cause." Justice Wright dissented from the decision, stating that "I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for 'good cause.'" *Id.* at 92. Justice Wright went on to remark that:

> [A]s for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!

Id. at 93.

In sum, this Court finds that Petitioner's ineffective assistance of appellate counsel claim is not barred by procedural default. As such, Petitioner is not precluded from raising that claim as an individual ground for relief, or as cause for the procedural default of his first claim for relief. In order to suffice as cause for the procedural default of his first claim for relief, the appellate attorney error alleged by Petitioner must rise to the level of an independent constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Ritchie v. Eberhart*, 11 F.3d 587 (6th Cir. 1994). That being the case, determining whether Petitioner has established cause for the procedural default applicable to his first claim for relief effectively requires the Court to address the merits of Petitioner's second claim for relief. Accordingly, the Court will address the merits of Petitioner's second claim for relief, *i.e.*, ineffective assistance of appellate counsel, before concluding the *Maupin* analysis of the first claim for relief.

III.

In his second claim for relief, Petitioner alleges ineffective assistance of appellate counsel. The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 711 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland v. Washington, 466 U.S. 668, 686 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel on the first appeal as of right must exercise reasonable professional judgment. *Evitts v. Lucey*, 469 U.S. 397 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). It is not enough for the Petitioner to merely argue that his appellate counsel failed to raise a nonfrivolous claim, for counsel does not have a duty to advance every nonfrivolous argument which is available. However, a petitioner may establish that counsel rendered constitutionally inadequate representation if the petitioner can show that counsel ignored

obvious issues of strength, while including those which were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994). In *Gray v. Greer*, 880 F.2d 644, 646 (7th Cir. 1985), the Seventh Circuit explained:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Id.

In the instant case, Petitioner's attorney on direct appeal raised a single assignment error, *i.e.*, that the trial court had erred in imposing a life sentence instead of a life sentence with the possibility of parole after twenty years. Petitioner contends that any lawyer reasonably knowledgeable of criminal law would have challenged the sufficiency of the evidence supporting Petitioner's conviction for the aggravated murder offense and the accompanying specification. According to Petitioner, at the time his direct appeal was taken, legal precedent existed for challenging the sufficiency of the evidence following a plea of guilty to aggravated murder. Petitioner also argues that at the time of his appeal, legal precedent existed for modification of the degree of homicide on appeal based upon the sufficiency of the evidence adduced during the R.C. § 2945.06 hearing. *State v. Place*, 25 Ohio App. 2d 158 (1971) (modifying the trial court's judgment that the defendant was guilty of murder in the first degree, because there was only sufficient evidence to support a judgment that the defendant was guilty of murder in the second degree.) Under *Strickland*, however, it is not enough for Petitioner merely to assert that counsel neglected to raise a claim that was available. In assessing Petitioner's allegation, this Court must

determine—not whether Petitioner's appellate counsel could have challenged the sufficiency of the evidence, or even whether Petitioner's appellate counsel *should* have raised that issue in the sense that it might have been beneficial to Petitioner—but whether the failure of Petitioner's appellate counsel to raise a sufficiency of the evidence claim was so egregious under professional norms governing his field, that he was not functioning as the advocate guaranteed by the Sixth Amendment to the United States Constitution.

Ordinarily, a defendant may not attack the sufficiency of the evidence following his plea of guilty. *State v. Hertz*, 135 N.E.2d 781 (Ohio App., 10 Dist. 1954). This principle does not apply to defendants who plead guilty to aggravated murder because of the unique statutory provision at R.C. § 2945.06. *State v. Taylor*, 30 Ohio App. 2d 252, 261 (1972). Section 2945.06 of the Ohio Revised Code provides in pertinent part:

> If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

Thus, in *State v. Tayor, supra*, the Court of Appeals for Cuyahoga County held that "since the *Hertz* case did not involve a murder case, nor a degree hearing, it can hardly be authority for blocking an appeal from the decision after proceedings under R.C. § 2945.06." *Id.* at 261. Petitioner correctly asserts, therefore, that legal precedent existed at the time of his appeal was taken for challenging the sufficiency of the evidence as to the degree of the offense to which he pleaded guilty. But the inquiry does not end here.

To resolve Petitioner's allegation of ineffective appellate counsel, this Court must determine whether challenging the sufficiency of the evidence under the specific facts of Petitioner's case was such a widely known and utilized practice under the standards governing criminal defense

attorneys, that appellate counsel's failure to raise the claim was professionally unreasonable. Two inquires are inherent in this task: (1) whether challenging the sufficiency of the evidence following a plea of guilty to aggravated murder was a standard practice under professional norms; and (2) whether most reasonable criminal defense attorneys would have challenged the sufficiency of the evidence under the facts of Petitioner's case. With respect to the first of these inquiries, a review of Ohio cases involving a plea of guilty or no contest to a charge of aggravated murder reveals that defendants often—though not always, or even most of the time—raise some sort of issue on appeal surrounding the culpability hearing required under R.C. § 2945.06 and/or the sufficiency of the evidence to support the degree of homicide.[18]

The foregoing suggests to this Court that the practice of challenging on direct appeal the sufficiency of the evidence to

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[18] In the following appellate cases, the defendants, following pleas of guilty to aggravated murder, challenged on direct appeal either the sufficiency of the evidence supporting the degree of homicide, or the trial court's alleged deviation from the procedure required under R.C. § 2945.06. *State v. Snyder*, 1996 WL 307268, No. 94 C.A. 2080 (Ohio App. 4 Dist. Jun. 4, 1996); *State v. Burrage*, 1992 WL 174663 No. 1755 (Ohio App. 4 Dist. Jul. 22, 1992); *State v. Korp*, 1989 WL 132127, No. 56132 (Ohio App. 8 Dist. Nov. 2, 1989); *State v. Hedrick* 1988 WL 18767, No. 53422 (Ohio App. 8 Dist. Feb. 18, 1988).

By contrast, the following appellate decisions involved defendants who, after pleading guilty to aggravated murder, did *not* challenge on direct appeal either the sufficiency of the evidence supporting the offense of aggravated murder, or whether the trial court had deviated from the procedures required under R.C. § 2945.06. *State v. Gesser*, 1956 WL 465406, No. 94 C.A. 225 (Ohio App. 7 Dist. Aug. 14, 1996); *State v. Anderson*, 108 Ohio App. 3d 5 (9 Dist. 1995); *State v. Roberson*, 1995 WL 23343 (Ohio App. 8 Dist. Jan. 19, 1995); *State v. Thompson*, 1993 WL 116081, No. CA-9063 (Ohio App. 5 Dist. Apr. 12, 1993); *State v. Stumpf*, 1986 WL 6502, Nos. CA760. CA-793 (Ohio App. May 22, 1986).

support a finding of guilt to a charge of aggravated murder following a guilty plea, while not so widely used as to be "automatic," is nonetheless far from novel. In any event, it is reasonable to conclude that a reasonably knowledgeable criminal defense attorney should at least be familiar with the issue.

As for the second inquiry, the Court finds that the specific facts of Petitioner's case warranted a sufficiency of the evidence challenge on direct appeal. Petitioner had maintained his innocence throughout the proceedings against him, and only entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), to avoid the potential consequences of going to trial. For that reason, Petitioner refused to adopt the statement of facts proffered by the prosecutor during the R.C. § 2945.06 culpability hearing. (Transcript, at 15-17.) *See State v. Post*, 32 Ohio St. 3d 380, 393-93 (1987) (holding that a statement of facts may satisfy the evidentiary requirement of R.C. § 2945.06, but only where the accused or his counsel has expressly or impliedly waived those procedures.).

Further, the single assignment of error raised by Petitioner's appellate counsel was: "The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty fully years of imprisonment." Thus, the entire essence of appellate counsel's brief focused on the appropriateness of the sentence that Petitioner had received, *i.e.*, the extent of Petitioner's culpability. In light of that fact, it is that much more difficult to understand why counsel would not have raised a sufficiency of the evidence challenge with respect to the degree of the offense in addition to—if not in lieu of—a simple challenge of the sentence imposed by the three judge panel following the mitigation hearing. The foregoing strongly suggests that counsel's failure to raise a sufficiency of the evidence challenge was not a tactical decision, but an oversight.

In sum, the Court is persuaded that Petitioner has a made a

prima facie showing of ineffective assistance of appellate counsel. Petitioner has demonstrated that appellate counsel neglected to raise on appeal an issue of obvious strength, and raised instead a claim which was clearly and significantly weaker. Further, without holding that there was insufficient evidence to support Petitioner's conviction for aggravated murder, the Court notes that the apparent absence in the trial record of any evidence as to the degree of the homicide—and therefore the potential viability of a sufficiency of the evidence challenge on direct appeal—is sufficient to undermine confidence in the outcome of Petitioner's direct appeal. Accordingly, Petitioner's second claim for relief is well taken.

III.

In his first claim for relief, Petitioner argues that there was insufficient evidence to support his conviction for aggravated murder. Petitioner contends in this third claim for relief that he was denied a meaningful opportunity to present his ineffective assistance of counsel claim by virtue of the fact that the appellate courts arbitrarily rejected his argument for "good cause," and that Ohio appellate courts routinely sue the "good cause" exception to the ninety day time limit in a manner such that good cause is never found. Because the Court has sustained Petitioner's second claim for relief, and finds that the appropriate remedy is to reinstate his direct appeal, it is unnecessary to reach a decision on Petitioner's other habeas corpus claims.

IV.

For the foregoing reasons, the Court finds that Petitioner's second claim for relief is meritorious, and should be sustained. The motion for a writ of habeas corpus is thus GRANTED as to Petitioner's second claim for relief, unless within ninety (90) days, the Ohio Court of Appeals reinstates Mr. Carpenter's direct appeal.

/s/JOSEPH P. KINNEARY
United States District Judge

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 90AP-803
(Regular Calendar)

STATE OF OHIO, Plaintiff-Appellee,

v.

ROBERT CARPENTER, Defendant-Appellant.

[Filed: September 29, 1994]

MEMORANDUM DECISION

ON MOTION

YOUNG, J.

Defendant-appellant, Robert Carpenter, has filed a *pro se* application for reopening of this court's decision in *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported (1991 Opinions 1032) pursuant to App.R. 26(B). In that decision, journalized on March 12, 1991, this court affirmed the judgment of the Franklin County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder.

The history of this case is as follows: appellant was indicted by the Franklin County Grand Jury for one count of aggravated murder with penalty specifications and one count of aggravated robbery. The aggravated murder count alleged

that, on October 5, 1988, appellant purposely caused the death of Thelma Young while committing the offense of aggravated robbery.

Appellant waived his right to a jury trial and agreed to have the case tried before a three-judge panel. In order to avoid a trial, appellant followed a procedure upheld in *North Carolina v. Alford* (1970), 400 U.S. 25, and entered a guilty plea, although he maintained his innocence. The guilty plea was accepted by the court after a recitation of facts by the prosecution. Both the prosecution and the defense then presented witnesses at a mitigation hearing and, on May 21, 1990, the trial court imposed a sentence of life with the possibility of parole only after serving thirty years. The court also imposed a concurrent sentence of ten to twenty full years on the aggravated robbery charge.

In his first appeal to this court, appellant argued that the appropriate sentence should have been life with the possibility of parole after twenty, as opposed to thirty full years. This court affirmed the trial court's sentence.

In his application for reopening, appellant argues that his appellate counsel was ineffective, for failure to raise the sufficiency of the evidence as an assignment of error in his initial appeal. Pursuant to App.R. 26(B), a criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying to reopen his direct appeal. Under the rule, an application for reopening must be filed "within ninety days from journalization of the appellate judgment."

The appellate judgment in this case was journalized on March 12, 1991, prior to the effective date of App.R. 26(B), July 1, 1993. In similar cases where the appellate judgment has been journalized prior to July 1, 1993, this court has essentially treated this ninety-day period as running from the effective date of App.R. 26(B). See *State v. Courtright* (Aug. 9, 1994), Franklin App. No. 86AP-34, unreported; *State v. Carpenter* (Aug. 11, 1994), Franklin app. No. 88AP-1181,

unreported. Clearly, appellant's motion for reopening was filed more than ninety days after the effective day of July 1, 1993, and a much longer time after the Supreme Court's decision in *State v. Murnahan* (1992), 63 Ohio St.3d 60, the predecessor to App.R. 26(B).

An application for reopening filed outside the ninety-day time limit should be denied unless the appellant can show good cause for filing at a later time. App.R. 26(B)(2)(b). Appellant asserts that he has shown good cause because he was not aware that he could raise an assignment of error directed to the sufficiency of the evidence.

A review of the transcript demonstrates that appellant waived his right to a jury trial and agreed to have the case heard by a three-judge panel. In addition, appellant sought to avoid a trial and, therefore, entered a guilty plea. The court questioned appellant extensively to ascertain that appellant's waiver of a jury trial, and his entering of a guilty plea, were done knowingly and voluntarily. In fact, the trial court refused to accept appellant's guilty plea, until the prosecution went forth with its proffer of the facts. The trial court explained that the prosecution had to demonstrate facts that touched all the essential elements of the crime charged in the indictment. Then, and only then, did the trial court believe it was empowered to accept appellant's plea. Appellant's counsel agreed with this approach.

Appellant's counsel further stipulated to the recitation of the facts as proffered by the state for purposes of the mitigation hearing. In *State v. Post* (1987), 32 Ohio St.3d 380, the Ohio Supreme Court stated in pertinent part:

> "Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State v. Robbins* (1964), 176 Ohio St. 362, 27 O.O.2d 312, 199 N.E.2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to

> 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." *Id.* at 393.

Accordingly, we find that appellant has failed to set forth any showing of good cause for filing beyond the ninety-day period required by App.R. 26(B)(1). If appellant was prejudiced by ineffective assistance of counsel in 1990, this fact should have been known to him by the time the Supreme Court decided *Murnahan, supra*, in 1992, and even more so by the effective date of App.R. 26(B). Appellant has therefore failed to show good cause for his delay in filing more than ninety days after the effective date of App.R. 26(B). Thus, appellant's application for reopening is denied.

Motion denied.

PETREE and CLOSE, JJ., concur.

Supreme Court, U.S.
FILED
OCT 8 1999
OFFICE OF THE CLERK

No. 98-2060

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

RONALD D. EDWARDS, WARDEN,

PETITIONER.

vs.

ROBERT W. CARPENTER,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 39 of this Court's Rules of Practice, Respondent moves this Court for leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for a Writ of Certiorari in accordance with Rule 33.2 of the Rules of Practice.

Respondent was represented by counsel appointed by the United States Court of Appeals for the Sixth Circuit pursuant to 18 U.S.C. §3006A.

Respectfully submitted

Dated: October 8, 1999

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Ronald D. Edwards, the Warden of Ohio Correctional Reception Center ("the Warden"), contends that his petition for a writ of certiorari "presents an important question of federal habeas procedure on which the circuit courts of appeals are now divided. The question is whether the procedural default of an ineffective-assistance-of-counsel claim precludes the claim from serving as cause for the procedural default of other claims presented on federal habeas." (Pet. at 3). For reasons that follow, Respondent Robert W. Carpenter ("Carpenter") submits that the question presented is not "important" - - this Honorable Court has already decided it. Moreover, the federal appellate circuits are not divided on this question. The reported opinions cited by the Warden are all distinguishable on the facts from those found in the record in the instant case.

I.

In *Murray v. Carrier*, 477 U.S. 478, 489, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1986), this Court observed that an ineffective assistance of counsel claim may be asserted as "cause" to excuse a procedural default and/or may be denominated as an independent constitutional ground for habeas relief. As would be true in the case of any claim involving an alleged deprivation of the prisoner's federal constitutional rights in a state criminal proceeding, the petitioner who desires to have his claim of ineffective assistance of counsel reviewed by the federal habeas court *as an independent ground for relief* must first present his claim to the state courts in accordance with any applicable state procedural rules and obtain a ruling by the state courts on the merits of such claim. If the petitioner does not succeed in obtaining a ruling on the merits from the state courts due to non-compliance with

an applicable rule of procedure, the federal habeas court will not consider the merits of such claim unless he can demonstrate "cause" for the procedural default and "prejudice" resulting therefrom. *Coleman v. Thompson*, 501 U.S. 722, 748, 111 S.Ct. 2546, 2563, 115 L.Ed.2d 640 (1991).

However, when ineffective assistance of counsel is raised by the habeas petitioner as "cause" for avoiding the bar of procedural default with respect to some other federal constitutional claim, it is sufficient that he has presented the issue of ineffective assistance to the state courts and provided those courts with the opportunity to correct any deprivation of the petitioner's Sixth Amendment right to counsel. *Carrier, supra*. This Court imposed a duty on the habeas petitioner to exhaust his claim of ineffective assistance in the state courts out of concerns of comity. The majority expressed its belief that a federal court should be loath "to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Id.* (quoting *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed.2d 761 (1950)).

The question of whether a habeas petitioner has demonstrated adequate "cause" within the meaning of the "cause" and "prejudice" exception to the waiver rule is a matter exclusively within the province of the federal courts. A state court would have no reason to decide, and frankly would have no business deciding, whether a federal district court, in a future habeas proceeding, should excuse a state prisoner's procedural default due to ineffective assistance of counsel in the state criminal proceedings. That determination is one to be made by the federal court in the first instance. The Sixth Circuit had it exactly right when it concluded that "[a] careful reading of *Murray* [*v. Carrier*] makes clear that the

Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented." (Pet. App. at 10a).

II.

Notwithstanding the clear direction of *Murray v. Carrier* on this question, the Warden raises the spectre that if the plain language of this Court's opinion is followed by the federal district and circuit courts, and the habeas petitioner is excused from complying with the time requirements of the state procedural rules for the raising of such claims, "long-since-defaulted claims can come springing back to life" many years after the petitioner's state conviction has become final. (Pet. at 14). As a result of the decision by the Sixth Circuit in Carpenter's case, according to the Warden, "the State is now left with no finality at all." (Pet. at 15).

The Warden can relax. A one year period of limitation applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. 28 U.S.C. §2254(d)(1). Subject to a few narrow exceptions not pertinent here, the one year time period runs from the date on which the state judgment of conviction becomes final following the conclusion of direct review in the state appellate courts or the expiration of the time for seeking such review. 28 U.S.C. §2254(d)(1)(A).

Although the time during which a properly filed state application for post-conviction or other collateral review does not count toward the one year limitation period, 28 U.S.C. §2254(d)(2), it is readily apparent that if the state prisoner does not present his claim of ineffective assistance of counsel to the state court by filing a post-conviction petition within

a period of one year from the date of the conclusion of his direct appeals to the state appellate courts, any federal habeas petition which is filed after the adjudication of the state post-conviction petition and which raises ineffective assistance of counsel as "cause" for a procedural default of a primary constitutional claim will be dismissed as a direct result of judicial enforcement of the bar of the federal one year statute of limitations.

In short, the federal statute of limitations protects the states from stale claims belatedly lodged by prisoners alleging deprivation of their constitutional rights during the state criminal proceedings. It accomplishes this by engrafting upon the rule in *Murray v. Carrier* a requirement that the petitioner must present his claim of ineffective assistance of counsel to the state courts no later than one year from the date of expiration of his direct appeals, or forever be barred from raising his primary defaulted constitutional claim(s) in a federal habeas action. If the petitioner misses the federal filing deadline, the question of "cause" becomes irrelevant.

This should present no difficulties to law enforcement and prison officials in states such as Kentucky[1] and Tennessee, which, according to the Warden, impose a three year and a one year time limit respectively on their post-conviction remedies for raising ineffective assistance claims. (Pet. at 14, n. 3). The fact that the State of Ohio has chosen to establish an arbitrarily shorter limitations period of 90 days (absent a showing of good cause) for the raising of claims of ineffective assistance of appellate counsel is hardly

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[1]In Kentucky, a state prisoner who waits more than a year to file his post-conviction petition but complies fully with the state's three year limitation period will be in no better position, as far as the federal habeas court is concerned, than a prisoner who files his post-conviction petition beyond the three year limitation period. The federal court will dismiss both of their habeas petitions on the basis of the expiration of the federal one year statute limitations..

grounds for jettisoning sound prior case precedent of this Court or for overruling the well-reasoned decision of the court of appeals in this case.

III.

The Warden and the *Amici* state officials contend that the Sixth Circuit opinion in Carpenter's case "has created confusion and conflict among the lower courts." (*Amici* Br. at 9). In support thereof, they cite a hodge-podge collection of *dicta* from reported cases involving inapposite procedural facts. A review of the opinions in the cited cases reveals that the final dispositions of those appeals are not inconsistent with the Sixth Circuit's opinion and judgment in *Carpenter* and that any "confusion" has more to do with the Warden's and the *Amici' s* quoting sweeping language from these opinions out of the context of the particular facts before the respective circuit courts of appeals.

In *Reyes v. Keane*, 118 F.3d 136 (2d Cir. 1997) and *Pisciotti v. Washington*, 143 F.3d 296 (7th Cir. 1998)[2], the petitioners failed to present the issue of ineffective assistance of appellate counsel to the state courts in any type of available proceeding for collateral review of their convictions. The *Carpenter* court correctly noted that *Reyes* (and by implication, *Pisciotti*) stands for the proposition that "a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray* [*v. Carrier*]." (Pet. App. at 12a).

[2]In *Piscotti*, the state court of appeals rejected the petitioner's claim of prosecutorial misconduct during jury arguments because trial counsel failed to object. In his state post-conviction petition, petitioner raised the ineffective assistance of trial counsel for the first time, but failed to raise the ineffectiveness of appellate counsel for failing to raise ineffective assistance of trial counsel in the original appeal. The state post-conviction court denied relief. In a federal habeas petition, petitioner raised the ineffectiveness of *both* trial and appellate counsel as cause for avoiding default of his constitutional claim of prosecutorial misconduct. Since the petitioner never presented the issue of effectiveness of appellate counsel to the state courts in any form, he failed to satisfy the exhaustion requirement of *Murray v. Carrier*.

In *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996), the petitioner waited until after the federal district court had already entered its judgment denying habeas relief before he made any effort to raise the ineffective assistance of counsel as "cause" for his procedural default. The Eleventh Circuit held that the petitioner was precluded from raising ineffective assistance as "cause" on appeal because "this argument was not fairly presented to the district court." *Id.*, 81 F.3d at 1029. The appellate panel's ensuing discussion concerning its view regarding the proper interpretation of *Murray v. Carrier* was entirely advisory and amounted to *obiter dictum* in the truest sense of that term.

In *Harris v. Lockhart*, 948 F.2d 450 (8th Cir. 1991), the petitioner presented his ineffective assistance claim to the state court in a petition for a writ of *coram nobis*, rather than a petition for post-conviction relief. The state court declined to rule on the ineffectiveness claim because such a claim can only be raised in a post-conviction petition. The Eighth Circuit affirmed the district court's refusal to consider ineffective assistance of counsel as "cause" for avoiding procedural default with respect to the petitioner's primary constitutional claim involving error in jury selection. The court of appeals held that the petitioner, by using the wrong state procedure, denied the state courts an opportunity to consider his claim of ineffective assistance of counsel on the merits. This result is not inconsistent with the view of the Sixth Circuit in Carpenter's case.

Justus v. Murray, 897 F.2d 709 (4th Cir. 1990) was a very simple case of a habeas petitioner's failure to exhaust an available state right of appeal. The petitioner had first raised the issue of ineffective assistance of appellate counsel in a state habeas petition. After the state trial court denied the petition, the petitioner appealed to the state supreme

court, but did not assign as error the trial court's adverse ruling on his ineffective assistance claim. Under the holding of this Court in *Ex Parte Hawke*, 321 U.S. 114, 64 S. Ct. 448, 88 L.Ed.2d 572 (1944), as well as provisions of 28 U.S.C. §2254(c), the petitioner's failure to exhaust his state appellate remedies with respect to the ineffectiveness claim precluded federal court review. The ultimate decision reached by the Fourth Circuit to deny the habeas petition was correct, and some gratuitous and impertinent language in the opinion notwithstanding, is not in conflict with the judgment of the Sixth Circuit in Carpenter's case[3].

The Warden and *Amici* have not demonstrated a conflict among the Circuits "on the same important matter" within the ambit of Rule 10(a) of this Court. In each of the cited opinions, the respective circuit court of appeals reached a result that is not inconsistent or in conflict with the Sixth Circuit's judgment in the instant case.

CONCLUSION

This Court will exercise jurisdiction and grant certiorari sparingly and "only for compelling reasons." Rule 10(a), Rules of Practice. The Warden has not demonstrated the existence of such "compelling reasons" under the factors listed in the Rules of Practice. This Court's limited time and resources should be reserved for truly meritorious cases. This case does not rise to such a level.

[3]Carpenter appealed the judgment of the Ohio Court of Appeals, denying his application to reopen his appeal, to the Ohio Supreme Court. (Pet. at 8). When the state supreme court denied further review, Carpenter (unlike the petitioner in *Justus*) exhausted all of his available state remedies with respect to his claim of ineffective assistance of appellate counsel.

Carpenter prays that upon review of the briefs in support and opposition, this Court will deny the petition for a writ of certiorari.

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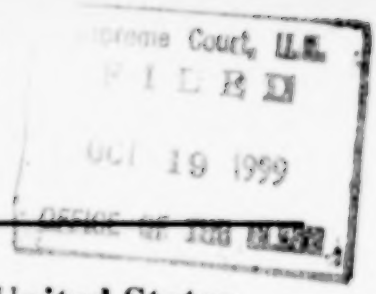

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The State of Ohio seeks this Court's review of a published decision of the Sixth Circuit, which held that a federal habeas court may properly view an ineffective-assistance-of-counsel claim as the "cause" for a habeas petitioner's procedural default of some other habeas claim, even when the ineffective-assistance claim is itself procedurally defaulted. According to the court of appeals, as long as the ineffective-assistance claim was *presented* to the State's courts, a federal court may address the merits of that claim even though the habeas petitioner presented it to the State's courts long after the deadline for doing so had passed. Pet. App. at 11a.

That decision runs counter to the deference to State procedural rules embodied in federal habeas law, and is not supported by this Court's decisions or the decisions of other federal courts. Yet respondent Carpenter claims in his brief in opposition that the question presented is "not important," Br. in Opp. at 1, and he argues that the decision below is "not inconsistent" with those of other circuits. *Id.* at 6, 7. He is wrong.

First, respondent suggests that federal courts should treat a habeas petitioner's procedural default of an ineffective-assistance claim differently from other procedural defaults, but he can point to no decisions from this or any other court (save the one below) that say so. He starts off well enough when he notes that a "federal habeas court will not consider the merits of [a procedurally-defaulted] claim unless [a habeas petitioner] can demonstrate 'cause' for the procedural default and 'prejudice' resulting therefrom," Br. in Opp. at 2 – a view we surely do not dispute – but he then argues that a procedurally-defaulted ineffective-assistance claim need not be subjected to the same cause and prejudice analysis. Rather, he claims, "it is sufficient that he has presented the issue of ineffective assistance to the state courts," Br. in Opp. at 2, regardless, it seems, of the State's own rules for the timely presentation of such claims, and regardless of the cause for his failure to comply with those rules. That view of the law aptly summarizes the judgment below, but hardly explains why it is the right one, or why the question is not an important one.

Surely this Court has never taken such a view, and indeed in a per curiam summary reversal earlier this year, the Court (unlike the court below in our case) applied the cause

and prejudice test to procedurally-defaulted ineffective-assistance claims. *See Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). The Court said in that case:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause, also fails. . . . [T]he ineffective assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to a state procedural rule . . . and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review.

119 S. Ct. at 1021.

The same can be said of the ineffective-assistance claims in *this* case, for, as even the court below acknowledged, Ohio's state courts had "denied the [ineffective-assistance] claim based on procedural default" because Carpenter had "filed the claim late, and according to the state court, without good cause for his delay." Pet. App. at 11a. Yet though Carpenter "failed to demonstrate cause or prejudice for his failure to raise th[is] claim[]" in accordance with the relevant "state procedural rule," *Stewart v. LaGrand*, 119 S. Ct. at 1021, the court below in our case never even looked to that cause and prejudice question, holding that Carpenter need only show that his defaulted ineffective-assistance claim "was presented to the state courts and . . . is exhausted." Pet. App. at 11a. In light of the Court's application of the cause and prejudice test to procedurally-

defaulted ineffective-assistance claims just this year in *LaGrand* – and the failure of the court below to do likewise – review of the judgment below (or perhaps even a summary reversal, as in *LaGrand*) is now appropriate, as the Sixth Circuit's new approach to the review of procedurally-defaulted ineffective-assistance claims applies not just to this case, but to every habeas case in which similar claims are raised.

Though respondent Carpenter relies on *Murray v. Carrier*, 477 U.S. 478 (1986), that case says nothing about an exception to the cause and prejudice test for procedurally-defaulted ineffective-assistance claims. If all other procedurally-defaulted claims must pass the cause and prejudice hurdle before a federal court can review them, why must not procedurally-defaulted ineffective-assistance claims? Neither respondent nor the court below offers any explanation for their view that those latter claims are different.

And respondent's trumpeting of "comity," Br. in Opp. at 2, is strange indeed, given his view in this case that federal courts ought to be free to review procedurally-defaulted claims that State courts themselves have refused to examine, regardless of the cause for the default. Where a "petitioner makes no attempt to demonstrate cause or prejudice for his default in state . . . proceedings, his claim is not cognizable in a federal suit for the writ." *Gray v. Netherland*, 518 U.S. 152, 162 (1996). That principle embodies the respect for and recognition of state procedures that "comity" refers to, and the decision below does not embrace that view at all.

No one disputes respondent's claim that the "question of whether a habeas petitioner has demonstrated adequate 'cause' within the meaning of the 'cause' and 'prejudice' exception to the waiver rule is a matter exclusively within the province of the federal courts." Br. in Opp. at 2. We have never suggested otherwise. But the problem here of course is that the court of appeals ignored the cause and prejudice test entirely when examining respondent's procedurally-defaulted ineffective-assistance claim. All agree that federal courts enjoy the *power* to apply the cause and prejudice test, but the question here is whether they have an *obligation* to do so when presented with procedurally-defaulted claims. Aside from the court below, all courts to examine the question have agreed that, absent some cause for the procedural default of an ineffective-assistance claim, such a claim cannot be used as cause for the procedural default of some other habeas claim.

As for the statute of limitations argument in respondent's brief, it is true that a one-year limitations period applies to the filing of new habeas petitions today. Br. in Opp. at 3. But the fact remains that the court below has now revived a procedurally-defaulted sufficiency-of-the-evidence claim dating from 1990. And even for post-AEDPA claims, the tolling provision in 28 U.S.C. 2244(d)(2) ("[t]he time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection") could still permit long-since-defaulted ineffective-assistance claims to come back to life. Here's how: even under AEDPA's new time limits, a defendant like Carpenter convicted today could toll the running of the one-year limitations period by pursuing

a variety of state postconviction remedies (relying on 28 U.S.C. 2244(d)(2)), and while those proceedings were pending in the state court system (and perhaps well after 365 days had passed from the completion of his direct appeal), he could file (as he did in our case) an untimely application to reopen his direct appeal under Rule 26(B) of the Ohio Rules of Criminal Procedure. Once the state court of appeals dismissed that application as untimely, the defendant would be free (according to the judgment below in this case) to include an ineffective-assistance-of-appellate-counsel claim in his habeas petition (and rely on that procedurally-defaulted claim as "cause" for other procedural defaults) whenever he filed his habeas petition (which he would do once his other state postconviction claims were dismissed, thereby restarting the one-year clock under 28 U.S.C. 2244(d)(2)).

The one-year limitations period in AEDPA does not eliminate the problem, which stems not from the staleness of Carpenter's claims (though they are indeed old), but from the court of appeals' refusal to respect the State's procedural rules for raising ineffective-assistance claims. If, as was true here, respondent's claim came too late for state-court review, it should likewise be unreviewable in federal habeas, absent some cause for the default. The federal habeas limitations period helps, but the State's authority to set and enforce its own 90-day limitations period for raising ineffective-assistance-of-appellate-counsel claims deserves no less respect in federal court than it receives in State court. The judgment below says otherwise, and AEDPA's new limitations period will not correct that problem.

Finally, respondent suggests that other federal courts view the question presented just as the court below does. He

is wrong. None of the circuit or district court opinions cited in our petition state or even hint that mere presentation of an already-defaulted ineffective-assistance claim to a state court is sufficient, as the court below held. None of the other decisions we cite says that procedurally-defaulted ineffective-assistance claims can be used in federal habeas to excuse the procedural default of other claims, and none of those other decisions says that procedurally-defaulted ineffective-assistance claims are exempt from the cause and prejudice analysis applicable to all other procedurally-defaulted claims. The decision below is an outlier, and finds no support in decisions of this Court or other federal courts. No other federal court of which we are aware has allowed a habeas petitioner to flout a State's procedural rules in this way, and then reviewed his procedurally-defaulted ineffective-assistance claim anyway (and done so without regard to the cause for the state court default of that claim). That approach is not one that other circuits have chosen to follow, and in light of this Court's decisions in *Murray* and now most recently in *LaGrand*, it is one that we can confidently say no published decision supports. Respondent surely offers no evidence to the contrary.

The principles of comity and federalism mean little if a State prisoner can ignore the State's procedural rules for raising an ineffective-assistance claim – rules which provide the State with an independent and adequate basis for dismissing the prisoner's claim – only to have a federal court revive the claim later, regardless of the cause for the prisoner's procedural default in State court. Once respondent Carpenter defaulted on both his sufficiency-of-the-evidence claim (in 1991) and on his ineffective-assistance claim (in 1993), the State ought to have been able to count on the

finality that its rules for raising such claims gave it when Carpenter filed his habeas petition in 1996. But now the one defaulted claim has propped up the other, and the case is back to square one in the state trial court.

As the 25 amici States supporting our petition have explained, the question presented is indeed of great importance. The court of appeals' approach – one likely to play out in many other habeas cases whenever procedurally-defaulted ineffective-assistance claims are raised – is not consistent with this Court's long-standing approach to habeas cases: "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). This Court should grant certiorari to consider whether – and ultimately confirm that – ineffective-assistance claims are *not* exempt from well-settled habeas doctrine just because the habeas petitioner invokes the ineffective-assistance claim as cause for the default of another claim. Either the court below is correct or all the other courts to address the question are, but in either case, that question is an important one that merits the Court's attention now.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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ROBERT W. CARPENTER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STATES OF TEXAS, ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

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Washington

STATEMENT OF *AMICI CURIAE* INTEREST

The State of Texas, and the 24 other States that join in this brief urge the Court to grant certiorari in this case to address an important question affecting the States' interest in the finality of state criminal convictions. At issue is whether a federal court reviewing a writ of habeas corpus is barred from considering an ineffective assistance of counsel claim as "cause" for the procedural default of another claim when the ineffective assistance claim itself is procedurally defaulted. The Sixth Circuit said no. *Carpenter v. Mohr*, 163 F.3d 938, 945-46 (CA6 1998), *petition for cert. filed* (U.S. June 22, 1999) (No. 98-2060).

The Sixth Circuit's decision overlooks well-established precedent requiring that it conduct a "cause" and "prejudice" analysis on the defaulted ineffective assistance claim before using the ineffective assistance of counsel claim as "cause" for another procedurally defaulted claim. Its argument that the Supreme Court was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for a procedurally defaulted independent issue misinterprets the Court's precedent regarding procedural bars in federal court.

Because the court of appeals has effectively ruled that procedurally defaulted ineffective assistance of counsel claims will be resurrected in federal court to serve as "cause" for other procedurally defaulted claims, a petitioner can knowingly choose to default claims in state court in hopes that a federal court will accord more favorable review of his federal claims. This creates a risk of forum-shopping for constitutional claims and undermines the States' legitimate interests in having the first opportunity to right their mistakes. Thus, the Sixth Circuit's decision offends state sovereignty.

If left standing, the lower court's opinion opens the doors to a flood of federal habeas litigation. Based on this decision, habeas petitioners can return to state court and file abusive state writs alleging a laundry list of ineffective assistance of counsel claims and bootstrap those claims to

other claims that have already been procedurally defaulted. For these reasons, the Sixth Circuit's decision undercuts long-standing principles of comity.

One of the purposes of the procedural default doctrine is to acknowledge the binding nature of state rules of procedure that preclude independent review by federal courts. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). In addressing a claim that has been procedurally defaulted in state court, a federal court shows a complete disregard for state procedural rules. Repeatedly, the Court has "emphasized the important interests served by state procedural rules at every stage of the judicial process and the harm to the States that results when federal courts ignore these rules." *Coleman v. Thompson*, 501 U.S. 722, 749 (1989). Indeed, the Court has recognized that "[a] state's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). Based on this long history of respect for state procedural requirements, the Court cannot countenance the Sixth Circuit's reasoning.

The Second, Fourth, Seventh, Eighth, and Eleventh Circuits have also addressed the issue and decided it contrary to the Sixth Circuit's position. *Reyes v. Keane*, 118 F.3d 136, 139-40 (CA2 1997); *Justus v. Murray*, 897 F.2d 709, 713 (CA4 1990); *Pisciotti v. Washington*, 143 F3d 296, 300 (CA7 1998); *Harris v. Lockhart*, 948 F.2d 450, 452 (CA8 1991); *Hill v. Jones*, 81 F.3d 1015, 1030 (CA11 1996), *cert. denied*, 519 U.S. 1119 (1997). The Sixth Circuit's decision creates a split in the circuits, and makes this important question ripe for review by the Court. Accordingly, certiorari should be granted and the decision below reversed.

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Amici file this brief on behalf of Petitioner, Ronald D. Edwards, because this case presents an issue of extraordinary importance to the states on which there is a clear conflict among the circuits. The Court should grant the petition for writ of certiorari because allowing habeas corpus petitioners to revive procedurally defaulted claims with another procedurally defaulted claim violates principles of state sovereignty.

SUMMARY OF THE ARGUMENT

A federal court reviewing a state prisoner's habeas corpus petition must respect a state court's determination that a particular claim is procedurally barred under state law. *Wainwright*, 433 U.S. at 90-91. When the state court has "clearly and expressly" stated that its judgment rests on a state procedural bar, a presumption arises that the state court decision rests on independent and adequate state law grounds. *Harris v. Reed*, 489 U.S. 255, 263 (1989). The purpose behind the independent and adequate state law doctrine is "to accord appropriate respect to the sovereignty of the states in our federal system." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 154 (1979). Consequently, a federal court's disregard for a state procedural default greatly taxes the states because it: 1) improperly threatens the finality of criminal convictions; and 2) frustrates the states' sovereign power to punish criminal offenders and their good faith efforts to honor constitutional rights. *Murray*, 477 U.S. at 487; *Coleman*, 501 U.S. at 748. Because of the circuit split on this important issue, the Court should grant the petition for writ of certiorari to hear this case.

ARGUMENT

I. THE PROCEDURAL DEFAULT DOCTRINE IS FOUNDED ON PRINCIPLES OF COMITY AND FEDERALISM.

The Sixth Circuit's conclusion that "[p]rinciples of comity do not require placing a procedural default analysis on claims asserted as cause" misinterprets this Court's procedural default jurisprudence. It is true that the doctrines of exhaustion and procedural default are distinct, but they share a common foundation on long-standing principles of federalism.

Murray, 477 U.S. at 495 ("[T]he principles of comity and finality . . . inform the concepts of cause and prejudice."); *see also Wainwright*, 433 U.S. at 81 ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."); *Coleman*, 501 U.S. at 731 ("[T]he exhaustion requirement is also grounded in principles of comity."); *Picard v. Connor*, 404 U.S. 270, 275 (1971) ("Comity is the underlying rationale for the exhaustion requirement.").

The court of appeals wrongly concluded that merely imposing the exhaustion requirement on claims asserted as "cause" for a procedural default sufficiently ensures that the state court has had the first opportunity to review the claims. *Carpenter*, 163 F.3d at 945. In fact, a claim that is procedurally defaulted is not reviewed on the merits by the state courts. This Court explicitly founded the procedural default doctrine on principles of comity and federalism. *Coleman*, 501 U.S. at 730. The *Harris* Court explicitly established the adequate and independent state ground doctrine to demonstrate respect for state procedural rules. *Harris*, 489 U.S. at 264. Like a petitioner who has failed to exhaust state court remedies, a petitioner who has procedurally defaulted his claims in state court has deprived the state of the opportunity to review those claims. *Coleman*, 501 U.S. at 732.

The doctrine of exhaustion is a statutory prerequisite to obtaining federal habeas review of a constitutional claim. 28 U.S.C. §2254(b) (1999). Similarly, the doctrine of procedural default is a common-law condition precedent to federal habeas review. *Murray*, 477 U.S. at 517 (Brennan, J., dissenting); *see also Harris*, 489 U.S. at 259. These two requirements must be independently met before a federal court will review a federal claim that was first presented to the state courts. Consequently, the Sixth Circuit's finding that "[t]here is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim" is wrong. *Carpenter*, 163 F.3d at 945. A careful review of this Court's procedural default jurisprudence shows

the lower court has made a glaring error. Federalism concerns demand that a federal court abstain from reviewing a claim when the state court relied on a procedural bar for dismissing the very same claim. *Coleman*, 501 U.S. at 729-30.

II. THE PROCEDURAL DEFAULT DOCTRINE DICTATES A "CAUSE AND PREJUDICE" ANALYSIS ON ALL CLAIMS PROCEDURALLY DEFAULTED IN STATE COURT.

A procedural default occurs when a criminal defendant fails to comply with a state procedural rule. *Wainwright*, 433 U.S. at 82-84. Generally, a state court will not review the merits of a procedurally defaulted claim, and a federal court is likewise barred from addressing the merits of the claim. *Id.* In finding that a habeas petitioner can use a procedurally defaulted ineffective assistance of counsel claim as cause for the procedural default of another claim, the court of appeals has erroneously opened the federal courthouse doors to state prisoners with defaulted claims. This Court's decisions in *Wainwright*, *Murray*, *Harris*, and *Coleman* compel a cause and prejudice analysis on a procedurally defaulted ineffective assistance of counsel claim before it can serve as "cause" for another procedurally defaulted claim.

In *Wainwright*, the Court held that to obtain federal habeas review of a constitutional claim that has been procedurally defaulted under state rules, a petitioner must show cause for the default and resultant prejudice. 433 U.S. at 87. The Court explicitly left open the question of the "precise definition of the 'cause'-and-'prejudice' standard." *Id.* at 88-91. This open question was revisited in *Murray*.

In *Murray*, the habeas petitioner, Carrier, procedurally defaulted his claim that the trial court erred in denying his discovery request for the victim's statements because he failed to present the issue on direct appeal. 477 U.S. 482-83. Carrier raised the discovery claim for the first time in his *pro se* state habeas petition. The state trial court dismissed the claim based on the procedural default, and the Virginia Supreme Court denied certiorari. Carrier raised the issue in his federal petition,

which the federal district court dismissed as procedurally barred. On appeal, Carrier argued that counsel had mistakenly omitted the claim on direct appeal, and this error was "cause" for the procedural default. The court of appeals reversed and remanded holding that a petitioner need only show that a procedural default was due to counsel's "ignorance or inadvertence rather than from a deliberate tactical decision." This Court decided that the court of appeal's standard was incorrect.

Carrier asked the Court to establish a lesser standard of counsel error, *i.e.*, mistake or inadvertence, to serve as "cause" for a procedural default on appeal. *Id.* at 490. The Court flatly rejected that proposition and held that only constitutionally deficient performance could constitute cause for a procedural default. *Id.* at 492. Accordingly, in *Murray* this Court firmly held that constitutionally ineffective assistance of counsel as established in *Strickland v. Washington*, 466 U.S. 668 (1984), can serve as "cause" for a procedural default of another claim provided that the ineffective assistance of counsel claim was independently raised in state courts. *Id.* at 488-89.

Carrier had not raised an independent claim of ineffective assistance of counsel in state court. In fact, the Court found that Carrier "disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim." 477 U.S. at 497. Consequently, because the Court found that Carrier was not raising an ineffective assistance of counsel claim for the default of his discovery issue, Carrier could not establish "cause" and the discovery claim was procedurally barred. *Id.*

In *Harris*, the Court found that federal habeas review of the petitioner's ineffective assistance claim was not precluded because the state appellate court, although mentioning a state procedural default, had addressed the substantive merits in rejecting the claim. 489 U.S. at 266. The Court held that "[a] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id.* at 263. In other words,

Harris established a presumption against an adequate and independent state law ground to support the state's decision when the last state court fails to explicitly state its reliance on a procedural default.

In *Coleman*, the petitioner filed an untimely notice of appeal from the state habeas court's adverse ruling. 501 U.S. at 727. The state moved to dismiss the appeal on the ground that the notice of appeal had not been filed within the time prescribed by a state procedural rule. *Id.* at 727-28. "Upon consideration" of the state's motion to dismiss and other pleadings filed, the state supreme court dismissed the appeal. *Id.* Because the state's motion to dismiss was based solely upon the state's procedural rule, this Court found that the state supreme court's dismissal appeared to rest primarily on state law. *Id.* at 740-44. Thus, the *Harris* presumption against adequate and independent state grounds did not apply and the federal habeas court was barred from reviewing the claims presented in the state habeas proceeding. *Id.* at 729-30, 740-44.

Contrary to this Court's clear precedent, however, the Sixth Circuit disregarded the state's procedural rules. Based on the court of appeals's opinion, any defaulted ineffective assistance of counsel claims can be resurrected in federal court by serving as "cause" for other independently procedurally defaulted claims. Acceptance of the Sixth Circuit's interpretation of *Murray* would subvert the important interests of finality, comity, and federalism underlying the Court's procedural default jurisprudence.

The Sixth Circuit's interpretation of this Court's precedent is unfounded. The court of appeals concluded that the *Murray* Court was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for another procedurally defaulted claim. *Carpenter*, 163 F.3d at 944. While it is true that the *Murray* Court stated that an ineffective assistance of counsel claim would need to be presented as an independent claim to the state courts before it could serve as "cause" for a separate procedurally defaulted claim, the Court expressed no opinion as to whether a procedurally defaulted ineffective assistance of counsel claim could serve as "cause." 477 U.S. at 489.

Indeed, in *Murray*, the petitioner was not even alleging an ineffective assistance of counsel claim. 477 U.S. at 483, 497. *Murray* cannot be interpreted in a vacuum. It must be considered in conjunction with the Court's other procedural default cases, *i.e.*, *Wainwright*, *Harris*, and *Coleman*.

The Sixth Circuit held that *Murray* did not impose a procedural default requirement for claims asserted as "cause," thus it refused to apply a cause and prejudice analysis on the defaulted ineffective assistance of counsel claim. The court of appeals's reasoning ignores the states' legitimate interest in the finality of their convictions and undermines the states' right to punish criminal defendants. *Coleman*, 501 U.S. at 748. This reasoning is contrary to the reasoning employed by this Court in *Wainwright*, *Harris*, and *Coleman*, although none of the cases directly addressed whether a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted constitutional claim.[1] This issue should be squarely addressed by the Court.

III. This Case Requires Immediate Review to Protect the States' Interests in Enforcement of Their Procedural Rules.

It is firmly established that a federal court cannot review a claim that has been explicitly ruled procedurally barred by the state's highest court considering the claim. *Harris*, 489 U.S. at 261-62; *Coleman*, 501 U.S.

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1. In a recent opinion, the Court stated that an ineffective assistance of counsel claim could not serve as "cause" for the procedural default of an Eighth Amendment claim because "the ineffective assistance of counsel [was], itself, procedurally defaulted." *Stewart* v. *LaGrand*, 119 S.Ct. 1018, 1021 (1999). Also, the Court indicated that the defaulted ineffective assistance claim was subject to the "cause and prejudice" standard. *Id.* Although the Court did not refer to any prior procedural default cases, the Court's reasoning in *Stewart* directly contradicts the Sixth Circuit's reasoning. The Court should take this case to remove any uncertainty as to the Court's holding in *Stewart*, and reaffirm the resounding principle of the independent and adequate state ground doctrine.

at 729-30. When a state court explicitly relies on a procedural bar to deny relief, a state prisoner may not obtain federal habeas relief unless he can demonstrate cause for the default and actual prejudice attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750; *Wainwright*, 433 U.S. at 87.

Murray established that when counsel is ineffective under the standard of *Strickland*, this may serve as "cause" within the meaning of *Wainwright*. 477 U.S. at 488-89. Also, *Coleman* reiterated that "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." 501 U.S. at 755. Therefore, an ineffective assistance of counsel claim cannot serve as "cause" for the procedural default of another claim, unless counsel's performance was constitutionally deficient. *Murray*, 477 U.S. at 492. Although this Court has cautioned that an ineffective assistance of counsel claim must have first been presented to the state courts as an independent claim in order for it to serve as "cause" in a federal court proceeding, it has not explicitly answered whether a procedurally defaulted ineffective assistance of counsel claim may serve as "cause." Logically, it should not.

Before finding that an ineffective assistance of counsel claim constitutes "cause" for another procedurally defaulted issue, a federal court must find that counsel's performance was constitutionally deficient. *Coleman*, 501 U.S. at 755. When a federal court addresses the merits of an ineffective assistance of counsel claim independently, it is reviewing a claim that the state courts never addressed because of the procedural default. The court of appeals acknowledged that independent review of the ineffective assistance of counsel claim was barred because the claim was defaulted in state court, yet found that *Murray* creates an exception and allows the claim to serve as "cause" for another procedurally defaulted claim when the claim is merely exhausted. *Carpenter*, 163 F.3d at 945 ("There is no additional requirement beyond exhaustion in

order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim.").

The court of appeals's reasoning defies logic. In this case, the state court's denial of relief is based on a state procedural default. *Carpenter*, 163 F.3d at 942. By failing to satisfy a state procedural requirement, Carpenter forfeited his right to review of the merits of his federal claim. The court of appeals's opinion overlooks well-established precedent requiring that it conduct a "cause" and "prejudice" analysis on Carpenter's defaulted claim before using the ineffective assistance of counsel claim as "cause" for another defaulted claim.

In contrast, the district court did apply a cause and prejudice analysis to the defaulted ineffective assistance of counsel claim and found that the procedural bar was not based on an adequate and independent state ground.[2] *Carpenter*, 163 F.3d at 943. The district court's analysis is consistent with procedural bar jurisprudence. The court of appeals derails this well-established precedent by deciding that a procedurally defaulted ineffective assistance of counsel claim can constitute "cause" for another procedurally defaulted claim without a cause and prejudice analysis on the ineffective assistance of counsel claim.

Because Carpenter's claim was dismissed on an independent and adequate state law ground, "resolution of any independent federal ground

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2. The district court's decision was based on the court's belief that Ohio had inconsistently applied the "good cause" standard in OHIO R. APP. P. 26. The court stated that in its review of Ohio cases, good cause was almost never found in some appellate districts, while in others, a standard was used that nearly always allowed a finding of good cause. Additionally, the district court noted that the Ohio Supreme Court had offered little guidance in this area. As a result, the district court found that Ohio did not have an adequate state procedural rule prohibiting subsequent review of federal constitutional claims in federal court. *Carpenter v. Mohr*, No. C-2-96-447 (S.D. Ohio Mar. 12, 1997). Because the Sixth Circuit did not agree with nor review the district court's finding, this Court should grant the petition and reverse and remand to afford the Sixth Circuit the opportunity to review this part of the district court's decision.

for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729. In fact, the procedural history of this case emphasizes the fundamental wisdom of barring federal habeas review based on an independent and adequate state ground of decision. The state courts never addressed Carpenter's constitutional complaint of ineffective assistance of appellate counsel because he failed to raise it in a procedurally correct manner. By deciding the issue, the court of appeals decided an issue that the state courts never considered and, potentially, given an award of relief broader than the Supreme Court could have permitted on direct review of the conviction. These actions are inappropriate for a court bound by federalism and comity.

IV. THIS CASE HAS CREATED CONFUSION AND CONFLICT AMONG THE LOWER COURTS.

Of the six courts of appeals that have addressed this issue, the Sixth Circuit stands alone in its conclusion that a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted claim. The Sixth Circuit's interpretation of *Murray* adds confusion to the procedural default doctrine. As previously discussed, the district court applied a cause and prejudice analysis to Carpenter's defaulted ineffective assistance of counsel claim. *Carpenter*, 163 F.3d at 943-44. Upon review, the district court determined that the state procedural rule was not an adequate and independent state ground, therefore it found that the ineffective assistance of counsel claim could serve as "cause" for the procedurally defaulted sufficiency of the evidence claim. The court of appeals found that the district court erred in applying a "cause and prejudice" analysis on the defaulted ineffective assistance of counsel claim. *Id.*

Similarly, in *Justus v. Murray*, 897 F.2d 709, 712 (CA4 1990), the district court employed the same reasoning as the Sixth Circuit in finding that a procedurally defaulted ineffective assistance of counsel claim could serve as cause under *Murray* because the claims were exhausted. On appeal, the Fourth Circuit rejected the district court's reasoning and held that *Wainwright* and *Harris* compel a "cause and prejudice" analysis

before a procedurally defaulted ineffective assist ›f counsel claim can serve as cause for another procedurally defau laim. *Id.* at 713. In juxtaposition, these two cases show that the Fou Circuit supports the district court's reasoning in *Carpenter*, and the Sixth Circuit favors the district court's reasoning in *Justus*.

Other lower courts that have faced this double-default dilemma are also in conflict with the Sixth Circuit's reasoning. In *Hill v. Jones*, the Eleventh Circuit flatly rejected petitioner's argument that *Murray* allows an ineffective assistance of counsel claim to serve as "cause" whenever the claim is exhausted as an independent claim regardless of whether it is also procedurally defaulted. 879 F.2d at 1029. The court concluded that *Murray* and "the rest of the Supreme Court's jurisprudence on procedural default dictate that procedurally defaulted claims of ineffective assistance cannot serve as cause to excuse a default of a second claim." *Id.* at 1030. "Instead, [*Murray*] requires a claim of ineffective assistance be both exhausted and not defaulted in state court before it can be asserted as cause." *Id.* at 1031.

In *Reyes v. Keane*, the petitioner argued that he satisfied "cause" for procedurally defaulting a jury instruction claim because his trial counsel rendered ineffective assistance. 118 F.3d at 138-39. Recognizing that an ineffective assistance of counsel claim can constitute "cause," the Second Circuit, nonetheless, found that petitioner failed to raise his ineffective assistance of counsel claim in state court. *Id.* at 139. Also, the ineffective assistance claim was procedurally defaulted because pursuant to state law presenting the claim to the state court would be futile. *Id.* Thus, the ineffective assistance of counsel claim was both exhausted and procedurally defaulted. Refusing to allow the ineffective assistance claim to serve as cause, the Second Circuit aptly stated:

> *Murray* refused to except from the doctrine of exhaustion a claim brought as cause for a procedural default. We think the Supreme Court's rationale . . . equally compels the conclusion that a claim of cause for procedural default is not itself excepted from the doctrine of procedural default.

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Id. at 140 (citations omitted). Accordingly, the court held that a procedurally defaulted ineffective assistance of counsel claim could not serve as cause for a second procedurally defaulted claim. *Id.*

In *Pisciotti v. Washington*, the Seventh Circuit also addressed the question posed in this petition. The court of appeals stated that before an ineffective assistance of counsel claim could establish "cause" for the default of another issue, "the ineffective-assistance claim must have been presented to the state courts in the manner required by state procedural rules." 143 F.3d at 300. Finally, in *Harris v. Lockhart*, the Eighth Circuit also held that a defaulted ineffective assistance of counsel claim could not serve as "cause" for the default of his other claims. 948 F.2d at 452.

The lower courts not governed by controlling precedent in their circuit are free to pick and choose the preferred reasoning from among these decisions. The Sixth Circuit's reasoning is at odds with the other circuits that have addressed the issue to date. Because the state pays a high price[3] when a federal court reviews a claim that is barred by the state courts, the Court should not let the Sixth Circuit's decision stand. The reasoning employed by the lower court is fundamentally flawed and will undermine a long history of respect for the states' procedural rules.

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3. As the Court stated in *Coleman*:

> most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction.

Coleman, 501 U.S. at 738-39.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court grant the petition for writ of certiorari.

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Supreme Court, U.S.
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No. 98-2060

IN THE SUPREME COURT OF THE UNITED STATES

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: NOVEMBER 8, 1999

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NOTICE

Because of poor print quality on some copies of the printed appendix to the petition for a writ of certiorari, we have reprinted here the four items that were included in that earlier appendix. All references in the parties' briefs on the merits to pages of the appendix refer to this appendix rather than the appendix to the petition.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

No. 96-CV-447

ROBERT W. CARPENTER, PLAINTIFF

v.

GARY C. MOHR, RESPONDENT

DOCKET ENTRIES

DATE	DOCKET NUMBERS	PROCEEDINGS
5/3/96	1	PETITION FOR WRIT OF HABEAS CORPUS (referred to Mag. Judge Norah M. King) (no pgs: 6) (wh) [Entry date 05/07/96]

* * * * *

DATE	DOCKET NUMBERS	PROCEEDINGS
6/19/96	5	RETURN OF WRIT by respondent to habeas corpus petition [1-1] (treated as mtn to dismiss) (no pgs: 15 + exhibits) (wh) [Entry date 06/20/96]
6/21/96	6	TRANSCRIPT filed of state court proceedings #88CR-10-3707 (1 vol) (wh) [Entry date 06/24/96]

* * * * *

9/26/96	9	Traverse by plaintiff to motion to dismiss (return of writ) [5-1] (wh) [Entry date 09/27/96]
3/12/97	10	OPINION AND ORDER: by Judge Joseph P. Kinneary Sr. granting habeas corpus petition [1-1] as to pet 2nd claim for relief unless w/in 90 days Ohio Court of Appeals reinstates pet direct appeal and dismissing case (cc: all counsel) (no pgs: 20) (wh)

DATE	DOCKET NUMBERS	PROCEEDINGS
3/12/97	11	JUDGMENT: dismissing case (cc: all counsel) (no pgs: 1) (wh)
4/9/97	12	NOTICE OF APPEAL by respondent Gary C. Mohr from Dist. Court decision [11-1] of 3/12/97 (no pgs: 2) (sm) [Entry date 04/10/97]
4/9/97	13	MOTION by respondent to stay judgment (no pgs: 5) (wh) [Entry date 04/10/97]
		* * * * *
4/21/97	15	NOTICE OF CROSS APPEAL by plaintiff Robert W Carpenter from Dist. Court decision [11-1] of 3/12/97 (no pgs: 2) (sm) [Entry date 04/23/97]
		* * * * *

DATE	DOCKET NUMBERS	PROCEEDINGS
6/4/97	17	ORDER by Judge Joseph P. Kinneary Sr. granting motion for certificate of appealability [16-1], - granting motion to stay judgment [13-1] pending review of judgment by USCA 6th (cc: all counsel) (no pgs: 2) (wh)
		* * * * *
5/18/99	25	ORDER by Mag. Judge Norah M. King –pet to articulate position re inconsistency between mandate of USCA & footnote 11 of that court's opinion by 5/24/99 (cc: all counsel) (no pgs: 1) (wh)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

v.

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
4/23/97	Prisoner Case Docketed with certificate of appealability pending in District Court. Notice filed by Appellant Gary Mohr. Notice filed by Appellee Cross-Appellant Robert W. Carpenter. Transcript needed: n (Respondent (State) filed Notice NOA; Petitioner filed cross appeal) (nb) [97-3392] (Habeas was granted and first NOA was filed by respondent) (nb) [97-3393]

* * * *

DATE	PROCEEDINGS
6/3/97	FIRST PROOF BRIEF filed by Jon C. Walden for Appellant Cross-Appellee Gary Mohr. Certificate of Service date 6/2/97. Number of Pages: 26. [97-3392, 97-3393] (vf) [97-3392 97-3393]

* * * *

7/14/97	PROOF BRIEF filed by Dennis C. Belli for Appellee Cross-Appellant Robert W. Carpenter. Copies: 1. Certificate of Service date 7/11/97. Number of Pages: 29. [97-3392, 97-3393] (vf) [97-3392 97-3393]

* * * *

8/12/97	THIRD PROOF BRIEF filed by Jon C. Walden for Appellant Cross-Appellee Gary Mohr. Certificate of service date 8/11/97. Number of Pages: 9. [97-3392, 97-3393] (vf) [97-3392 97-3393]

* * * *

DATE	PROCEEDINGS
4/28/98	CAUSE ARGUED on 4/28/98 by Charles L. Wille for Appellant Cross-Appellee Gary Mohr in 97-3393, Dennis C. Belli for Appellee Cross-Appellant Robert W. Carpenter in 97-3393 before Judges Merritt, Jones, Norris. [97-3393] (paw) [97-3393]
12/18/98	OPINION filed: AFFIRMED the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but REMAND the case to the district court for the imposition of a remedy consistent with this opinion. Respondent's direct appeal is rendered moot, decision for publication pursuant to local rule 24 [97-3392, 97-3393]. Gilbert S. Merritt, Circuit Judge, Nathaniel R. Jones, Authoring Judge, Alan E. Norris, Circuit Judge. (nb) [97-3392 97-3393]
12/18/98	JUDGMENT: AFFIRMED REMANDED – (nb) [97-3392 97-3393]

* * * *

DATE	PROCEEDINGS
1/4/99	PETITION for en banc rehearing filed by Charles L. Wille for Appellant Cross-Appellee Gary Mohr. Certificate of service date 1/4/99. [97-3392, 97-3393] (blh)

* * * *

3/24/99	ORDER filed denying petition for en banc rehearing [1865483-1] filed by Charles L. Wille [97-3392, 97-3393].
4/1/99	MANDATE ISSUED with no cost taxed [97-3392, 97-3393] (vf) [97-3392 97-3393]

COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

State of Ohio,	:	January Term, 1990
	:	
Plaintiff,	:	Case No. 88CR-10-3707
	:	
vs.	:	Indictment: Aggravated
	:	Murder with Specification
Robert William Carpenter,	:	(R.C. 2903.01);
	:	(Aggravated Robbery
Defendant.	:	(R.C. 2911.01) (1 count);
	:	(Total 2 counts)

[Filed: June 7, 1990]

OPINION
AND
FINDINGS OF FACT

This matter is before the Panel following Robert Carpenter's plea of guilty of one count of Aggravated Murder with death penalty specifications and one count of Aggravated Robbery.

Pursuant to Ohio Revised Code §2929.03(F), the panel is required to set forth the specific findings of which the mitigating factors set forth in division (B) of the Ohio Revised Code §2929.04 it found to exist, what aggravating circumstances the offender was found guilty of committing, and whether or not it found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.

STATEMENT OF FACTS

On or about October 5, 1988, the defendant, Robert Carpenter went to the residence of Thelma Young, a 73-year-old woman, whom the defendant knew very well. Mrs. Young would hardly admit anyone to her home, but knew the defendant well enough to let him enter her home. While there, the defendant bludgeoned the victim with a blunt object and repeatedly cut and stabbed her with a sharp object and screw driver.

The victim kept cash in her purse and a larger amount of reserve cash in her dresser. All of the cash was missing and not found by the police.

The defendant was subsequently arrested, claiming that two Cubans and a black man kidnapped him and forced him to go to the victim's residence where they killed Mrs. Young. No evidence was found or presented by the State corroborating defendant's story that three other men were involved in the murder.

The case came before the three-judge panel on March 29, 1990. At that time, the defendant waived in open court and in writing his right to a jury trial, consenting instead to be tried by the three-judge Panel; also at this time the defendant waived his rights pursuant to a written plea of guilty form and an extensive written plea agreement, both of which were signed by himself, his lawyers and the prosecuting attorneys and explained in detail to him by the Panel. He plead guilty to both counts in the indictment.

In rendering this opinion, the Panel has considered the evidence presented at the plea and mitigation stages, the psychiatric testimony admitted by way of mitigation. Arguments by counsel were waived.

AGGRAVATING CIRCUMSTANCES

The Panel finds the defendant has plead guilty to the following aggravating circumstances:

1. In compliance with §2941.14 of the Ohio Revised Code, the Grand Jurors further find Specification One to the First Count, under section 2929.04(A)(7) of the Ohio Revised Code, that the offense at bar was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Robbery, and the offender was the principal offender in the commission of the aggravated murder.

MITIGATING FACTORS

Ohio Revised Code [§]2929.04(B) sets forth seven factors that shall be considered in mitigation. The Panel is required to determine which facts listed in §2929.04(B), supra, exist, if any. The Panel's findings as to those facts are as follows:

1. Whether the victim of the offense induced or facilitated it; not a mitigating factor.

2. Whether it is unlikely the offense would have been committed but for the fact the offender was under duress, coercion or strong procation; not a mitigating factor.

3. Whether at the time of committing the offense the offender because of a mental illness or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform this

conduct to requirement of law; not a mitigating factor.

4. The youth of the offender; not a mitigating factor.

5. The offender's lack of significant history of prior criminal convictions and delinquency of judication; a mitigating factor which will be discussed below.

6. If the offender was a participant in the offense but not the principal offender, the degree of offender's participation in the offense and degree of offender's participation in the acts that lead to the death of the victims; not a mitigating factor.

7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

In considering paragraph 7 of §2929.04, supra, the following factors were found to exist:

1. The defendant had a trouble free child and adulthood up to about 30 years of age;

2. The defendant, at about age 30, began abusing crack cocaine, and this abuse may have been a contributing factor to his conduct on the date in question;

3. The defendant suffered from chronic depression and sever episodic depression, most likely exacerbated by the abuse of crack cocaine;

4. The defendant's family was caring and supportive but encouraged the defendant to avoid the additional risk of going to trial in this case;

5. The victim's family concurred in the written plea agreement;

6. That the ultimate sentence of life imprisonment with no possibility of parole for thirty (30) years will in all probability result in the defendant's demise in prison.

The nature and circumstances of the events surrounding Thelma Young's death are clear to the Panel. The Panel will not reiterate each and every fact of October 5, 1986 between the hours of 8:30 and 10:00 o'clock p.m., preferring to leave the details of the transcript to speak. The salient facts, however, are clear that Thelma Young was found in her home by her son Warren Young shortly after 10:00 o'clock p.m. on the 5th of October, 1988.

The victim had been bludgeoned several times by a blunt instrument, cut in several different places about her head and body by a sharp cutting instrument and stabbed multiple times with a screwdriver. The victim kept cash in her purse for daily needs, as well as reserve cash in her dresser. No cash was found at the scene by the police.

The only person present during the killing was the defendant, and he is the only one who could tell what happened to Mrs. Young. Some of these facts came to the Panel through the psychological

testimony of two psychologists, both of whom testified about their interview with the defendant, who admitted that he stabbed the victim several times with a screw driver.

The history, character and background of the defendant presents a picture that weighs heavily in the mitigation determination. The mitigating evidence demonstrates that the defendant had a rather uninvolved childhood. Although his biological parents divorced when he was quite young, he was raised by an industrious father who provided essentially for the defendant's basic needs. The psychological testimony did indicate that the defendant developed early on feelings of inadequacy due to his perceptions of his stepfather's treatment of him, as well as other forces contributing to his feelings of inadequacy. Nevertheless, the defendant developed normally, avoided adolescent criminal behavior and moved into manhood uneventfully. Most of the mitigating testimony by family, friends, wife and child painted a sketch of a man who was devoted to his family, provided for their economic and emotional welfare and was basically a good man, never given to violence or criminality. While the defendant was barely literate when he left high school, he taught himself to functionally read and write and led a limited, but otherwise seemingly happy life.

Then, at about the age of 30, the defendant began abusing crack cocaine at different times, resulting in several hospitalizations due to deep episodic depression. Both psychologists testified that he was chronically depressed which most likely was exacerbated by the abuse of cocaine. Although his

psychological tests revealed about average intelligence, he began deteriorating psychologically with the abuse of cocaine, reducing his ability to maintain steady employment. In essence, the defendant was an average citizen, crime free all his life until he came under the ravages of cocaine, resulting in the only crime with which he has ever been charged, aggravated murder. Other than these few minutes, the defendant has been a loyal, hardworking and productive person.

The Panel, however, in considering all of the factors involved, additionally weighed the desire of those concerned to eliminate the trauma and necessity of the trial.

The Panel also weighed heavily the fact that he most likely will never offend again, due to his age at the time of his eligibility for parole, even if he lives that long.

It is, therefore, the judgment of the Panel that in weighing all of the factors of mitigation against the aggravating circumstances, the Panel cannot find beyond a reasonable doubt that the aggravated circumstances outweigh the mitigating circumstances.

The judgment of the Panel is that the defendant be sentenced as to Count One to life imprisonment with no possibility of parole for a full thirty (30) years in the ORIENT CORRECTIONAL FACILITY; and to ten (10) years minimum to twenty-five (25) years maximum in the ORIENT CORRECTIONAL FACILITY as to Count Two.

These two sentences are to run concurrently. Jail time credit shall be 589 days through May 17, 1990. Additional jail time credit shall be granted to the defendant while awaiting transfer to the Department of Rehabilitation and Correction.

/s/ TOMMY L. THOMPSON
Tommy L. Thompson, Chairman

/s/ DAVID CAIN
David Cain, Judge

/s/ C. HOWARD JOHNSON
C. Howard Johnson, Judge

Copies to:

Michael Miller
Franklin County Prosecutor
Attn: Daniel Hogan
Tim Mitchell

Gerald Simmons

James Kura
Franklin County Public Defender
Attn: Mary Younger

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 90AP-803
(Regular Calendar)

STATE OF OHIO, Plaintiff-Appellee,

v.

ROBERT CARPENTER, Defendant-Appellant.

[Filed: September 29, 1994]

MEMORANDUM DECISION

ON MOTION

YOUNG, J.

Defendant-appellant, Robert Carpenter, has filed a *pro se* application for reopening of this court's decision in *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported (1991 Opinions 1032) pursuant to App.R. 26(B). In that decision, journalized on March 12, 1991, this court affirmed the judgment of the Franklin County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder.

The history of this case is as follows: appellant was indicted by the Franklin County Grand Jury for one count of aggravated murder with penalty specifications and one count of aggravated robbery. The aggravated murder count alleged that, on October 5, 1988, appellant purposely caused the death of Thelma Young while committing the offense of aggravated robbery.

Appellant waived his right to a jury trial and agreed to have the case tried before a three-judge panel. In order to avoid a trial, appellant followed a procedure upheld in *North Carolina*

v. Alford (1970), 400 U.S. 25, and entered a guilty plea, although he maintained his innocence. The guilty plea was accepted by the court after a recitation of facts by the prosecution. Both the prosecution and the defense then presented witnesses at a mitigation hearing and, on May 21, 1990, the trial court imposed a sentence of life with the possibility of parole only after serving thirty years. The court also imposed a concurrent sentence of ten to twenty full years on the aggravated robbery charge.

In his first appeal to this court, appellant argued that the appropriate sentence should have been life with the possibility of parole after twenty, as opposed to thirty full years. This court affirmed the trial court's sentence.

In his application for reopening, appellant argues that his appellate counsel was ineffective, for failure to raise the sufficiency of the evidence as an assignment of error in his initial appeal. Pursuant to App.R. 26(B), a criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying to reopen his direct appeal. Under the rule, an application for reopening must be filed "within ninety days from journalization of the appellate judgment."

The appellate judgment in this case was journalized on March 12, 1991, prior to the effective date of App.R. 26(B), July 1, 1993. In similar cases where the appellate judgment has been journalized prior to July 1, 1993, this court has essentially treated this ninety-day period as running from the effective date of App.R. 26(B). See *State v. Courtright* (Aug. 9, 1994), Franklin App. No. 86AP-34, unreported; *State v. Carpenter* (Aug. 11, 1994), Franklin app. No. 88AP-1181, unreported. Clearly, appellant's motion for reopening was filed more than ninety days after the effective day of July 1, 1993, and a much longer time after the Supreme Court's decision in *State v. Murnahan* (1992), 63 Ohio St.3d 60, the predecessor to App.R. 26(B).

An application for reopening filed outside the ninety-day time limit should be denied unless the appellant can show good cause for filing at a later time. App.R. 26(B)(2)(b). Appellant asserts that he has shown good cause because he was not aware that he could raise an assignment of error directed to the sufficiency of the evidence.

A review of the transcript demonstrates that appellant waived his right to a jury trial and agreed to have the case heard by a three-judge panel. In addition, appellant sought to avoid a trial and, therefore, entered a guilty plea. The court questioned appellant extensively to ascertain that appellant's waiver of a jury trial, and his entering of a guilty plea, were done knowingly and voluntarily. In fact, the trial court refused to accept appellant's guilty plea, until the prosecution went forth with its proffer of the facts. The trial court explained that the prosecution had to demonstrate facts that touched all the essential elements of the crime charged in the indictment. Then, and only then, did the trial court believe it was empowered to accept appellant's plea. Appellant's counsel agreed with this approach.

Appellant's counsel further stipulated to the recitation of the facts as proffered by the state for purposes of the mitigation hearing. In *State v. Post* (1987), 32 Ohio St.3d 380, the Ohio Supreme Court stated in pertinent part:

> "Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State v. Robbins* (1964), 176 Ohio St. 362, 27 O.O.2d 312, 199 N.E.2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." *Id.* at 393.

Accordingly, we find that appellant has failed to set forth any showing of good cause for filing beyond the ninety-day period required by App.R. 26(B)(1). If appellant was prejudiced by ineffective assistance of counsel in 1990, this fact should have

been known to him by the time the Supreme Court decided *Murnahan, supra*, in 1992, and even more so by the effective date of App.R. 26(B). Appellant has therefore failed to show good cause for his delay in filing more than ninety days after the effective date of App.R. 26(B). Thus, appellant's application for reopening is denied.

Motion denied.

PETREE and CLOSE, JJ., concur.

IN THE SUPREME COURT OF OHIO

No. 95-1129

STATE OF OHIO, Appellee,

v.

CARPENTER, Appellant.

[Submitted: Oct. 24, 1995]

[Decided: Jan. 31, 1996]

Appellant, Robert Carpenter, was convicted of aggravated murder and aggravated robbery and was sentenced to concurrent terms of imprisonment of thirty years to life and ten to twenty years, respectively. He appealed, and his convictions were affirmed. *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported, 1991 WL 35009.

In 1994, appellant filed an application to reopen his direct appeal under App.R. 26(B), claiming ineffective assistance of appellate counsel. As good cause for failing to file within ninety days of journalization of the judgment sought to be reopened, as required by App.R. 26(B)(2)(b), appellant stated that he was unaware he could raise an assignment of error related to sufficiency of the evidence. The court of appeals found that this reason did not constitute good cause, and appellant appealed its decision to this court.

Michael Miller, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, for appellee.

Dennis C. Belli, Columbus, for appellant.

PER CURIAM.

The judgment of the court of appeals is affirmed on authority of *State v. Reddick* (1995), 72 Ohio St.3d 88, 647 N.E.2d 784.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, WRIGHT, RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER and COOK, JJ., concur.

PETITION UNDER 28 U.S.C. §2254
FOR WRIT OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

No. 96-CV-447

ROBERT W. CARPENTER, PLAINTIFF

v.

GARY C. MOHR, RESPONDENT

[Filed May 3, 1996]

United States District Court District: S.D. Ohio, E.D.

Name: Robert W. Carpenter Prisoner No: 226-931

Place of Confinement:
Orient Correctional Reception Center
P.O. Box 300
Orient, Ohio 43146

Name of Petitioner (include name under which convicted):		Name of Respondent (authorized person having custody of petitioner):
Robert W. Carpenter	v.	Gary C. Mohr, Warden

The Attorney General of the State of: Ohio
30 East Broad Street, Columbus, Ohio 43215

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Franklin County Court of Common Pleas, 369 South High Street, Columbus, Ohio 43215

2. Date of judgment of conviction July 7, 1990

3. Length of sentence a life sentence and a concurrent sentence of 10 to 25 years imprisonment

4. Nature of offense involved (all counts) count one: aggravated murder, Ohio Rev. Code §2903.01, with specifications, count two: aggravated robbery, Ohio Rev. Code §2911.01

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☒
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   ---

6. If you pleaded not guilty, what kind of trial did you have (Check one) N/A
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial? N/A
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐
9. If you did appeal, answer the following:
   (a) Name of court Ohio Tenth District Court of Appeals

   (b) Result judgment affirmed

   (c) Date of result and citation, if known State v. Carpenter (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported

   (d) Grounds raised the sentence imposed by the trial court is excessive and contrary to the evidence and the law.

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
   (1) Name of court _____
   (2) Result _____
   (3) Date of result and citation, if known _____
   (4) Grounds raised _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
   (1) Name of court _____
   (2) Result _____
   (3) Date of result and citation, if known _____
   (4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court Ohio Tenth District Court of Appeals
    (2) Nature of proceeding application for reopening of appeal
    (3) Grounds raised the judgment of the court of common pleas finding petitioner guilty of aggravated murder and a principal offender specification is not supported by sufficient evidence, and is against the manifest weight of the evidence; petitioner was denied the effective assistance of appellate counsel
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☒
    (5) Result application denied

    (6) Date of result April 24, 1995

    (b) As to any second petition, application or motion give the same information:
    (1) Name of court _____
    (2) Nature of proceeding _____
    (3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion:
Yes ☐ No ☒
(5) Result _____
(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____
_____
_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge of the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: The State of Ohio failed to produce sufficient evidence to support petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting FACTS (state *briefly* without citing cases or law) Following petitioner's Alford plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute

and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

B. Ground two: Petitioner was denied the effective assistance of counsel in his direct appeal from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting FACTS state *briefly* without citing cases or law): In his direct appeal from his conviction, petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

C. Ground three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting FACTS (state *briefly* without citing cases or law): The state appellate courts arbitrarily rejected petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

D. Ground four: _____

_____

Supporting FACTS (state *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing None held
    (b) At arraignment and plea Gerald G. Simmons, 1243 South High Street, Columbus, Ohio 43206; Mary Younger, 373 South High Street, Columbus, Ohio 43215
    (c) At trial None held
    (d) At sentencing Same as listed in 15(b) above.
    (e) On appeal Allen Adair, 373 South High Street, Columbus, Ohio 43215
    (f) If any post-conviction proceeding Dennis C. Belli, 844 South Front Street, Columbus, Ohio 43206
    (g) On appeal from any adverse ruling in a post-conviction proceeding same as listed in 15(b) above

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
    Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
    Yes ☐ No ☒
    (a) If so, give name and location of court which imposed sentence to be served in the future: _____
    _____
    (b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ DENNIS C. BELLI
Signature of Attorney (if any)
Dennis C. Belli (0025216)
844 South Front Street
Columbus, Ohio 43206

I declare under penalty of perjury that the foregoing is true and correct. Executed on

4-30-96
(date)

Sworn & Subscribed before me
this April 30, 1996.
/s/ GLENNADINE M. HESS
Glennadine M. Hess
Notary Public
My Commission Expires July 7, 1996
Recorded in Pickaway County

/s/ ROBERT W. CARPENTER
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-96-447

ROBERT CARPENTER, Petitioner

v.

GARY MOHR, WARDEN, Respondent.

[Filed: March 12, 1997]

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the instant petition, Respondent's return of writ, Petitioner's traverse, and the exhibits of the parties.

On October 14, 1989, Petitioner was indicted by the Franklin County Grand Jury for one count of aggravated murder, with a death penalty specification, and one count of aggravated robbery. Represented by two attorneys, Petitioner entered *Alford* pleas to both counts on March 29, 1990, whereafter a mitigation hearing was held to determine Petitioner's sentence. Petitioner received a life sentence for the aggravated murder, and a concurrent ten (10) to twenty-five (25) year sentence for the aggravated robbery.

Represented by an assistant Franklin County public defender, Petitioner appealed to the Court of Appeals for the Tenth Appellate District. He raised the following assignment of error:

> The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty full years of imprisonment.

On March 12, 1991, the Court of Appeals affirmed the judgment of the trial court. It does not appear from the record that Petitioner appealed the Court of Appeals' decision to the Supreme Court of Ohio.

However, on March 13, 1992, Petitioner filed a *pro se* post-conviction action in the trial court. He raised the following issues for review:

1. Ineffective Counsel,
2. Improper charging or offenses, and improper sentences imposed;
3. Illegal plea of guilty obtained by coercion, and inappropriate information and improper dialogue with the court pursuant to Rule 11; and
4. Constitutional violations.

On June 18, 1992, the trial court dismissed Petitioner's action on the ground that he had "shown no substantive grounds for relief."

Petitioner filed a *pro se* appeal to the Court of Appeals for the Tenth Appellate District, and raised the following assignments of error:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGEMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.
2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

Thereafter, counsel was appointed to assist Petitioner with his appeal. Counsel filed an additional brief on September 30, 1992, wherein he raised the following argument.

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUMMARILY DISMISSING APPELLANT'S PETITIONS FOR POST CONVICTION RELIEF UNDER OHIO REVISED CODE § 2953.21 (C) AND (E).

On December 3, 1992, the Court of Appeals affirmed the judgment of the trial court on the ground that "[t]he petition filed by defendant is insufficient to state a claim for post-conviction relief under R.C. 2953.21."

Petitioner then filed a *pro se* appeal to the Supreme Court of Ohio. He raised two propositions of law:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY

REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

On April 14, 1993, the Supreme Court of Ohio dismissed Petitioner's appeal.

Represented by new counsel, Petitioner filed an application in the Court of Appeals to reopen his direct appeal on the basis of ineffective assistance of appellate counsel. Petitioner's new attorney assigned as error appellate counsel's failure to raise the following issue:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEA FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

On September 29, 1994, the Court of Appeals denied Petitioner's request to reopen his direct appeal on the basis of Petitioner's failure to show good cause why he could not have filed the motion within the ninety-day period required by Ohio R. App. P. 26(B)(1).

Petitioner sought leave to appeal to the Supreme court of Ohio. On June 14, 1995, the Supreme Court accepted

jurisdiction, and set deadlines for the filing of merit briefs. Petitioner raised the following propositions of law:

1. The applicability of the good cause exception to the ninety day time period for the filing of an application to reopen an appeal in a criminal case under App. R. 26(B)(1) must be evaluated by balancing the interests under the facts of a particular case so as to give effect to the overriding concern that a defendant have a meaningful opportunity required by the due process cause of the fifth and fourteenth amendments to the federal constitution to challenge his conviction.

2. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider whether the defendant possessed actual knowledge during the ninety day period of the existence of the grounds for appeal not raised by his appellate counsel, or had reason to question the constitutionality of his conviction on grounds not raised by his appellate counsel. The court of appeals must also consider whether it was appellate counsel's own deficient performance that resulted in the reopening at an earlier time, or whether defendant deliberately by-passed the orderly procedures in the rules of appellate procedure.

3. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider the effect that the passage of time between the journalization of the appellate judgment of the appellate judgment and the filing of the application for reopening will have on the state's ability to defend against

defendant's challenge. The absence of material prejudice to the state weights in favor of a finding of good cause.

On January 31, 1996, the Supreme Court of Ohio affirmed the Court of Appeals' decision without opinion.

This federal habeas corpus action ensued. Petitioner seeks a writ of habeas corpus based on the following claims for relief:

Ground One: The State of Ohio failed to produce sufficient evidence to support Petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting Facts: Following Petitioner's *Alford* plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

Ground Two: Petitioner was denied the effective assistance of counsel in his direct appeal

from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting Facts: In his direct appeal from his conviction, Petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived Petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

Ground Three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting Facts: The state appellate courts arbitrarily rejected Petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception [to] the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, Petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

Respondent argues in the first instance that Petitioner's first and second claims are procedurally barred. Respondent argues in the alternative that all of Petitioner's claims lack merit. The Court will first address Respondent's argument that Petitioner's first and second claims are procedurally barred.

I.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the

state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*.

The first part of the *Maupin* test requires the Court to determine whether Petitioner violated a procedural rule. The failure to raise a claim on direct appeal that appears on the face of the record constitutes a procedural default under Ohio's doctrine of *res judicata*. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Perry*, 10 Ohio St. 2d 175 (1967). In the instant case, Petitioner's first claim for relief, *i.e.*, that the State failed to produce sufficient evidence of Petitioner's guilt, addresses an alleged error which would appear on the face of the record. Accordingly, Petitioner's failure to raise this claim on direct appeal constitutes a procedural default under Ohio's doctrine of *res judicata*.

The state courts were never given an opportunity to enforce the procedural rule in this instance due to the nature of Petitioner's procedural default. Consequently, the Court deems the second part of *Maupin* test to have been satisfied.

The Court further finds that the procedural rule is an adequate and independent state ground upon which to deny relief. The doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981); *State v. Perry*, 10 Ohio St. 2d 175 (1967). Further, the doctrine of *res judicata* serves the

state's interests in finality, and in ensuring that claims are adjudicated at the earliest possible opportunity.

The Court having found that Petitioner's first claim for relief is subject to a procedural default, and that this procedural rule provides an adequate and independent ground for denying relief, it is incumbent upon Petitioner to demonstrate both cause for his procedural default, and actual prejudice resulting from the alleged error. As cause for the failure to raise his sufficiency of the evidence claim on direct appeal, Petitioner asserts ineffective assistance of appellate counsel. Given that "[a] federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the ineffectiveness claim was itself presented to the state courts as an independent claim," this Court must first determine whether Petitioner's ineffective assistance of appellate counsel claim has been preserved for federal habeas corpus review.

II.

Applying the *Maupin* analysis therefore, this Court must first determine whether a procedural rule applies to Petitioner's claim, and if so, whether Petitioner violated that rule. In Ohio, claims of ineffective assistance of appellate counsel must be raised in an application to reopen the direct appeal within ninety days of the Court of Appeals' judgment entry. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); Ohio R. App. P. 26(B). Untimely applications may be filed only by leave of the court of appeals upon a showing of good cause for the delay[1] Petitioner filed an application to reopen his direct appeal on the basis of ineffective assistance of appellate counsel on July 15,

[1] In *State v. Reddick*, 72 Ohio St. 3d 88 (1995), the Supreme Court of Ohio held that the 90-day limit and good cause exception imposed by the July 1, 1993 amendment to Ohio R. App. P. should apply to cases which predated that amendment.

1994. In an effort to comply with the Ohio R. App. P. 26(B), Petitioner alleged as cause for his failure to file this application within the allotted time period that he had relied on appellate counsel's expertise, and was himself unaware at the time of his direct appeal that his attorney could have raised a sufficiency of the evidence claim following his guilty plea. The Court of Appeals rejected this allegation, and dismissed Petitioner's application for the failure to show cause for the untimely filing. The Supreme Court of Ohio affirmed the Court of Appeals' decision. Thus, the first and second parts of the *Maupin* test would appear to be satisfied.

The third part of the *Maupin* test requires this Court to determine whether the state procedural rule is an adequate and independent ground for precluding relief. To be "independent," the procedural rule at issue, as well as the state court's reliance thereon, must rely in no part on federal law. *See Coleman v. Thompson*, 501 U.S. 722, 732-33 (1991). To be adequate, the state procedural rule must be firmly established and regularly followed by the state courts. *Ford v. Georgia*, 498 U.S. 411 (1991). "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id.* at 423 (quoting *James v. Kentucky*, 466 U.S. 341, 348-351 (1984); *see also Barr v. City of Columbia* 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964). It is difficult, in light of the foregoing, for this Court to find that the procedural rule in this case was "firmly established and regularly followed" by the state courts at the time that Petitioner filed his delayed motion for reconsideration.

A review of Ohio appellate court decisions reveals that at the time that Petitioner filed his application, there are was no firmly established state procedure for enforcing the "good cause" requirement for applications that were not filed within

the ninety day period. For instance, it appears that some Ohio appellate courts apply a standard under which "good cause" will almost never be found. *See State v. Owens*, 1996 WL 146097, No. 84 C.A. 131 (Ohio App. Dist. 7 Mar. 29, 1996). Other Ohio appellate courts employ a standard under which "good cause" will almost always be found. *See State v. Nitenson*, 1994 WL 679894, No. 91 C.A. 796 (Ohio App. Dist. 4 Feb. 24, 1994). Still other Ohio appellate courts appear to avoid the "good cause" issue, and proceed instead to the merits of the applicant's claim(s). *See State v. Holland*, 1994 WL 142735, No. 92AP-853 (Ohio App,. Dist. 10 Apr. 21, 1994).

The Supreme Court of Ohio has offered little guidance. This Court could not find a single appeal wherein the Supreme Court of Ohio found "good cause" for the untimely filing of an application for delayed reconsideration brought pursuant to Ohio R. App. P. 26(B). In *State v. White*, 72 Ohio St. 3d 91, 92-93 (1995), the applicant sought review by the Ohio Supreme Court of the Court of Appeals' decision that the applicant had failed to show good cause for the untimely filing of his applicant for reconsideration. The applicant's attorney, an Assistant Ohio Public Defender, had attached an affidavit to the application explaining that he had been unable to file the application sooner due to his heavy workload, and that the defendant was in no way responsible for the delay. The Ohio Supreme court affirmed the Court of Appeals' determination that the explanation did not suffice as "good cause." Justice Wright dissented from the decision, stating that "I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for 'good cause.'" *Id.* at 92. Justice Wright went on to remark that:

> [A]s for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was

> ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!

Id. at 93.

In sum, this Court finds that Petitioner's ineffective assistance of appellate counsel claim is not barred by procedural default. As such, Petitioner is not precluded from raising that claim as an individual ground for relief, or as cause for the procedural default of his first claim for relief. In order to suffice as cause for the procedural default of his first claim for relief, the appellate attorney error alleged by Petitioner must rise to the level of an independent constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Ritchie v. Eberhart*, 11 F.3d 587 (6th Cir. 1994). That being the case, determining whether Petitioner has established cause for the procedural default applicable to his first claim for relief effectively requires the Court to address the merits of Petitioner's second claim for relief. Accordingly, the Court will address the merits of Petitioner's second claim for relief, *i.e.*, ineffective assistance of appellate counsel, before concluding the *Maupin* analysis of the first claim for relief.

III.

In his second claim for relief. Petitioner alleges ineffective assistance of appellate counsel. The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 711 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland v. Washington, 466 U.S. 668, 686 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel on the first appeal as of right must exercise reasonable professional judgment. *Evitts v. Lucey*, 469 U.S. 397 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). It is not enough for the Petitioner to merely argue that his appellate counsel failed to raise a nonfrivolous claim, for counsel does not have a duty to advance every nonfrivolous argument which is available. However, a petitioner may establish that counsel rendered constitutionally inadequate representation if the petitioner can show that counsel ignored obvious issues of strength, while including those which were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994). In *Gray v. Greer*, 880 F.2d 644, 646 (7th Cir. 1985), the Seventh Circuit explained:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Id.

In the instant case, Petitioner's attorney on direct appeal raised a single assignment error, *i.e.*, that the trial court had erred in imposing a life sentence instead of a life sentence with the possibility of parole after twenty years. Petitioner contends that any lawyer reasonably knowledgeable of criminal law would have challenged the sufficiency of the evidence supporting Petitioner's conviction for the aggravated murder offense and the accompanying specification. According to Petitioner, at the time his direct appeal was taken, legal precedent existed for challenging the sufficiency of the evidence following a plea of guilty to aggravated murder. Petitioner also argues that at the time of his appeal, legal precedent existed for modification of the degree of homicide on appeal based upon the sufficiency of the evidence adduced during the R.C. § 2945.06 hearing. *State v. Place*, 25 Ohio App. 2d 158 (1971) (modifying the trial court's judgment that the defendant was guilty of murder in the first degree, because there was only sufficient evidence to support a judgment that the defendant was guilty of murder in the second degree.) Under *Strickland*, however, it is not enough for Petitioner merely to assert that counsel neglected to raise a claim that was available. In assessing Petitioner's allegation, this Court must determine—not whether Petitioner's appellate counsel could have challenged the sufficiency of the evidence, or even whether Petitioner's appellate counsel *should* have raised that issue in the sense that it might have been beneficial to Petitioner—but whether the failure of Petitioner's appellate counsel to raise a sufficiency of the evidence claim was so egregious under professional norms governing his field, that he

was not functioning as the advocate guaranteed by the Sixth Amendment to the United States Constitution.

Ordinarily, a defendant may not attack the sufficiency of the evidence following his plea of guilty. *State v. Hertz*, 135 N.E.2d 781 (Ohio App., 10 Dist. 1954). This principle does not apply to defendants who plead guilty to aggravated murder because of the unique statutory provision at R.C. § 2945.06. *State v. Taylor*, 30 Ohio App. 2d 252, 261 (1972). Section 2945.06 of the Ohio Revised Code provides in pertinent part:

> If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

Thus, in *State v. Taylor, supra*, the Court of Appeals for Cuyahoga County held that "since the *Hertz* case did not involve a murder case, nor a degree hearing, it can hardly be authority for blocking an appeal from the decision after proceedings under R.C. § 2945.06." *Id.* at 261. Petitioner correctly asserts, therefore, that legal precedent existed at the time of his appeal was taken for challenging the sufficiency of the evidence as to the degree of the offense to which he pleaded guilty. But the inquiry does not end here.

To resolve Petitioner's allegation of ineffective appellate counsel, this Court must determine whether challenging the sufficiency of the evidence under the specific facts of Petitioner's case was such a widely known and utilized practice under the standards governing criminal defense attorneys, that appellate counsel's failure to raise the claim was professionally unreasonable. Two inquires are inherent in this task: (1) whether challenging the sufficiency of the evidence following a plea of guilty to aggravated murder was a standard practice under professional norms; and (2) whether most reasonable criminal defense attorneys would have challenged the sufficiency of the evidence under the facts of Petitioner's case. With respect to the first of these inquiries, a review of Ohio cases involving a plea of guilty or no contest to a charge of aggravated murder reveals that defendants often—though not always, or even most of the time—raise some sort of issue on

appeal surrounding the culpability hearing required under R.C. § 2945.06 and/or the sufficiency of the evidence to support the degree of homicide.[2]

The foregoing suggests to this Court that the practice of challenging on direct appeal the sufficiency of the evidence to support a finding of guilt to a charge of aggravated murder following a guilty plea, while not so widely used as to be "automatic," is nonetheless far from novel. In any event, it is reasonable to conclude that a reasonably knowledgeable criminal defense attorney should at least be familiar with the issue.

As for the second inquiry, the Court finds that the specific facts of Petitioner's case warranted a sufficiency of the evidence challenge on direct appeal. Petitioner had maintained his innocence throughout the proceedings against him, and only entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), to avoid the potential consequences of going to trial. For that reason, Petitioner refused to adopt the statement of facts proffered by the prosecutor during the R.C. §

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[2] In the following appellate cases, the defendants, following pleas of guilty to aggravated murder, challenged on direct appeal either the sufficiency of the evidence supporting the degree of homicide, or the trial court's alleged deviation from the procedure required under R.C. § 2945.06. *State v. Snyder*, 1996 WL 307268, No. 94 C.A. 2080 (Ohio App. 4 Dist. Jun. 4, 1996); *State v. Burrage*, 1992 WL 174663 No. 1755 (Ohio App. 4 Dist. Jul. 22, 1992); *State v. Korp*, 1989 WL 132127, No. 56132 (Ohio App. 8 Dist. Nov. 2, 1989); *State v. Hedrick* 1988 WL 18767, No. 53422 (Ohio App. 8 Dist. Feb. 18, 1988).

By contrast, the following appellate decisions involved defendants who, after pleading guilty to aggravated murder, did *not* challenge on direct appeal either the sufficiency of the evidence supporting the offense of aggravated murder, or whether the trial court had deviated from the procedures required under R.C. § 2945.06. *State v. Gesser*, 1996 WL 465406, No. 94 C.A. 225 (Ohio App. 7 Dist. Aug. 14, 1996); *State v. Anderson*, 108 Ohio App. 3d 5 (9 Dist. 1995); *State v. Roberson*, 1995 WL 23343 (Ohio App. 8 Dist. Jan. 19, 1995); *State v. Thompson*, 1993 WL 116081, No. CA-9063 (Ohio App. 5 Dist. Apr. 12, 1993); *State v. Stumpf*, 1986 WL 6502, Nos. CA760. CA-793 (Ohio App. May 22, 1986).

2945.06 culpability hearing. (Transcript, at 15-17.) *See State v. Post*, 32 Ohio St. 3d 380, 393-93 (1987) (holding that a statement of facts may satisfy the evidentiary requirement of R.C. § 2945.06, but only where the accused or his counsel has expressly or impliedly waived those procedures.).

Further, the single assignment of error raised by Petitioner's appellate counsel was: "The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty fully years of imprisonment." Thus, the entire essence of appellate counsel's brief focused on the appropriateness of the sentence that Petitioner had received, *i.e.*, the extent of Petitioner's culpability. In light of that fact, it is that much more difficult to understand why counsel would not have raised a sufficiency of the evidence challenge with respect to the degree of the offense in addition to—if not in lieu of—a simple challenge of the sentence imposed by the three judge panel following the mitigation hearing. The foregoing strongly suggests that counsel's failure to raise a sufficiency of the evidence challenge was not a tactical decision, but an oversight.

In sum, the Court is persuaded that Petitioner has a made a *prima facie* showing of ineffective assistance of appellate counsel. Petitioner has demonstrated that appellate counsel neglected to raise on appeal an issue of obvious strength, and raised instead a claim which was clearly and significantly weaker. Further, without holding that there was insufficient evidence to support Petitioner's conviction for aggravated murder, the Court notes that the apparent absence in the trial record of any evidence as to the degree of the homicide—and therefore the potential viability of a sufficiency of the evidence challenge on direct appeal—is sufficient to undermine confidence in the outcome of Petitioner's direct appeal. Accordingly, Petitioner's second claim for relief is well taken.

III.

In his first claim for relief, Petitioner argues that there was insufficient evidence to support his conviction for aggravated murder. Petitioner contends in this third claim for relief that he was denied a meaningful opportunity to present his ineffective

assistance of counsel claim by virtue of the fact that the appellate courts arbitrarily rejected his argument for "good cause," and that Ohio appellate courts routinely sue the "good cause" exception to the ninety day time limit in a manner such that good cause is never found. Because the Court has sustained Petitioner's second claim for relief, and finds that the appropriate remedy is to reinstate his direct appeal, it is unnecessary to reach a decision on Petitioner's other habeas corpus claims.

IV.

For the foregoing reasons, the Court finds that Petitioner's second claim for relief is meritorious, and should be sustained. The motion for a writ of habeas corpus is thus GRANTED as to Petitioner's second claim for relief, unless within ninety (90) days, the Ohio Court of Appeals reinstates Mr. Carpenter's direct appeal.

/s/JOSEPH P. KINNEARY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

v.

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-00447—Joseph P. Kinneary, District Judge.

Argued: April 28, 1998

Decided and Filed: December 18, 1998

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge. Respondent Gary C. Mohr, a warden for the State of Ohio, appeals from the district court's grant of a conditional writ of habeas corpus to petitioner Robert W. Carpenter. The district court held that Carpenter's appellate counsel on direct appeal in state court was ineffective for failing to raise a sufficiency of the evidence claim, and ordered that the state court reinstate Carpenter's appeal within ninety days or a writ of habeas corpus would be issued. Carpenter cross-appeals from the district court's decision not to decide his remaining habeas claims. For the reasons stated herein, we affirm the district court's determination that Carpenter established cause for procedurally defaulting his insufficient evidence claim. However, we remand the case for issuance of a writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing.

I.

On the evening of October 5, 1988, Warren Young found the dead body of his adoptive mother Thelma Young,[1] a 73-year-old woman, in her Columbus, Ohio home. She had apparently been bludgeoned to death with a blunt object and repeatedly cut and stabbed with a sharp object and a screw driver. All of the cash kept in her purse and bedroom dresser had been removed. The next day, on October 6, 1988, Carpenter, Warren Young's close friend, telephoned 9-1-1 and stated that he had information concerning the crime. He informed the police officers investigating the crime that while he was attending to his car at a gas station, three men forced him at gun point to the rear of his car, and drove the car to Young's home. At Young's home, two men took Carpenter's shirt and glasses. According to Carpenter, the three men then forced Carpenter to knock on the door, and when Young answered pushed Carpenter inside. Carpenter asserted that one of the men went with Carpenter into Young's bedroom where he forced Carpenter to dump the contents of Young's purse on the bed. That man then took the money from Young's purse and forced Carpenter into the bathroom. While Carpenter was in the bathroom, Young was murdered. After the men left, Carpenter exited the bedroom, removed a screw driver from Young's mouth, and rolled Young's body onto its back. He retrieved his glasses and shirt that were lying near the body, picked up the screw driver and left the house. The next day he called 9-1-1.

Although the police initially considered Carpenter a witness, he was eventually arrested. The police retrieved a number of items of evidence connecting Carpenter to the crime scene, including pieces of Carpenter's clothing with blood from the victim, as well as a screw driver found in his car. J.A. at 308. Carpenter, however, consistently maintained that although he was present during the murder, others actually committed the crime.[2]

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[1] All references to "Young" are to Thelma Young.

[2] While in jail prior to his culpability hearing, Carpenter apparently confessed to a state psychiatrist a slightly different version of events. In

On October 14, 1989, a Franklin County Grand Jury returned an indictment charging Carpenter with one count of aggravated murder with a death penalty specification under Ohio Rev. Code § 2903.01, and one count of aggravated robbery under Ohio Rev. Code § 2911.01. Carpenter initially entered a general plea of not guilty to the charges, but as a result of a plea agreement, waived his right to a jury trial and changed his plea to a conditional guilty plea pursuant to the procedure approved in *North Carolina v. Alford*, 400 U.S. 25 (1970), in which he pleaded guilty while still maintaining his innocence. During the culpability hearing concerning his guilty plea, held before a three-judge panel, Carpenter asserted his innocence and stated that he pleaded guilty only to avoid the death penalty. J.A. at 253-55. The prosecution then recited its statements of facts concerning the charges, which the parties agreed that the defense would neither admit nor deny. J.A. at 257. No witnesses were called during the culpability hearing and no testimony or exhibits were admitted other than the prosecution's statement concerning the crime. After hearing the prosecution's statement, the three-judge panel accepted Carpenter's plea and found beyond a reasonable doubt that Carpenter had committed the crimes charged in the indictment, including the death penalty specification that Carpenter was the principal offender and committed the murder during the commission of an aggravated robbery. The three-judge panel then conducted a mitigation hearing to determine Carpenter's sentence and subsequently sentenced Carpenter to a life term of imprisonment with no possibility of parole for thirty years on the aggravated murder count, and to a concurrent term of ten years minimum to twenty-five years maximum on the aggravated robbery count.

On October 9, 1990, Carpenter (through counsel) appealed his convictions and sentence to the Ohio Court of Appeals,

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this version, Carpenter still maintained that he was an unwilling participant when three men forced their way into Young's home and killed her; yet admitted that the men were known to him and that he had voluntarily accompanied the men who he claimed had gone to Young's home in order to retrieve a drug debt that Young's son owed them. Carpenter also admitted to being forced to strike Young with the screw driver after she was already dead. J.A. at 613-17.

assigning only one error.[3] The Court of Appeals affirmed the convictions and sentence, and Carpenter did not appeal this decision to the Ohio Supreme Court.

On March 13, 1992, Carpenter applied for post-conviction relief and filed a pro se petition to vacate or set aside his convictions and sentence asserting four errors.[4] The trial court dismissed the petition on June 18, 1992, finding no substantive grounds for relief. Carpenter then appealed this decision, again pro se, to the Ohio Court of Appeals asserting two errors.[5] After the state's response, Carpenter filed an additional assignment of error pro se.[6] Carpenter then obtained court-appointed counsel and on September 30, 1992, filed another brief asserting one assignment of error.[7] On December 3, 1993, the Ohio Court of Appeals affirmed the lower court decision dismissing Carpenter's petition to vacate, finding that the conclusory statements made in support of his petition were insufficient to state a ground for post-conviction relief. Carpenter (again pro se) appealed to the Ohio Supreme Court which dismissed the appeal on April 14, 1993.

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[3] Carpenter's counsel argued that the evidence offered in mitigation established that the only reasonable sentence was a sentence of life with possibility of parole after twenty years rather than thirty. J.A. at 61-69. He did not challenge the sufficiency of the evidence.

[4] The claims were: (1) ineffective counsel; (2) improper charging of offenses and improper sentences imposed; (3) *Alford* plea obtained illegally by coercion and threats; and (4) constitutional violations. J.A. at 85-86. He also requested production of documents to support his petition.

[5] On that appeal Carpenter argued: (1) the trial court committed reversible error in dismissing his petition to vacate sentence and failing to grant him an evidentiary hearing on his claims; and (2) the trial court erred in not ordering the clerk to convey requested documents to him.

[6] The trial court's refusal to allow him requested documents violated his rights under the Ohio Constitution. J.A. at 113-17.

[7] The trial court erred by summarily dismissing Carpenter's petition for post-conviction relief without affording him an evidentiary hearing to substantiate his grounds for relief.

On July 15, 1994, after retaining yet another counsel, Carpenter filed an application to reopen his direct appeal in the Ohio Court of Appeals pursuant to Ohio R. App. P. 26(B), alleging that his original appellate counsel was ineffective because he had failed to raise the sufficiency of the evidence claim on direct appeal. This was Carpenter's first opportunity to raise the claim of ineffective assistance of appellate counsel because under Ohio law such claims cannot be raised in post-conviction proceedings, but must be raised either in a motion for reconsideration in the court of appeals through an application to reopen direct appeal, or in an appeal to the Ohio Supreme Court. *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992). The Ohio Court of Appeals dismissed Carpenter's application on September 29, 1994, determining that Carpenter had failed to show good cause for filing his application beyond the ninety-day period required under Ohio R. App. P. 26(B)(1).[8] Carpenter subsequently appealed this decision to the Ohio Supreme Court, which on January 31, 1996 affirmed the Ohio Court of Appeals' decision in a one sentence per curiam opinion relying on the authority of *State v. Reddick*, 647 N.E.2d 784 (Ohio 1995).

On May 3, 1996, Carpenter filed a habeas corpus petition with the United States District Court for the Southern District of Ohio. He alleged: 1) insufficiency of the evidence to support his plea and subsequent sentence; 2) ineffective assistance of appellate counsel; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state

[8] Ohio Appellate Rule 26(B) provides in pertinent part that a defendant may appeal from a judgment of conviction or sentence based on a claim of ineffective assistance of appellate counsel by filing an application to reopen the direct appeal "in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1). Rule 26(B) also provides that an application will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio R. App. P. 26(B)(5).

Carpenter's direct appeal was journalized on March 21, 1991, two years before the effective date of this rule, and therefore the court treated the effective date of the rule, July 1, 1993, as the start date for the time requirement. Carpenter filed his application to reopen the direct appeal on July 15, 1994, more than ninety days after the effective date of the rule.

courts through the application of Ohio Appellate Rule 26(B). On March 12, 1997, the district court entered judgment for Carpenter on his ineffective assistance of appellate counsel claim and ordered that a writ of habeas corpus conditionally issue unless the Ohio Court of Appeals reinstated Carpenter's direct appeal from the state conviction within ninety days. The district court did not rule on Carpenter's sufficiency of the evidence and lack of meaningful relief claims, deeming them moot. The State timely appeals from this judgment and Carpenter cross appeals from the district court's denial of relief on his two other grounds, as well as the district court's choice of remedy.

II.

This court reviews *de novo* a district court's disposition of a petition for a writ of habeas corpus, but nonetheless reviews the district court's factual findings for clear error. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997); *see also West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996); *Warner v. United States*, 975 F.2d 1207, 1217 (6th Cir. 1992).

We first address Carpenter's cross-appeal because the resolution of that appeal in Carpenter's favor would render the State's appeal moot. Carpenter argues that the district court erred on several grounds by failing to reach the merits of his sufficiency of the evidence claim.[9] First, he argues that the district court erroneously applied the four part *Maupin* test for state procedural default.[10] The district court determined

[9] Carpenter also argues that the district court erred in failing to reach the merits of his claim that Ohio Appellate Rule 26(B) precludes a petitioner from the opportunity for meaningful litigation of his or her federal claims in state court. We find that our resolution of Carpenter's sufficiency of the evidence claim renders this claim moot.

[10] Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit utilizes a four part analysis when a state argues that a federal habeas claim has been procedurally defaulted in state court. This court determines: 1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; 2) whether the state courts actually enforced the state procedural rule; 3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so 4) the petitioner must establish cause for his failure to follow the rule and prejudice by the alleged constitutional error. *Id.*

initially that Carpenter's sufficiency of the evidence claim was waived for purposes of habeas review because he failed to assert it in state court making it barred there due to res judicata. *See State v. Perry*, 226 N.E.2d 104, 105 (Ohio 1967) (applying res judicata to bar claim of ineffective assistance of counsel in state court); *State v. Sowell*, 598 N.E.2d 136, 140 (Ohio Ct. App. 1991) (same). Neither party contests this ruling. The district court then determined that in order to hear the claim on federal habeas review, it must decide if Carpenter had asserted "cause and prejudice" for the state procedural default. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) ("If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error."); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As "cause" for his failure to raise the sufficiency of evidence claim in state court on direct appeal, Carpenter asserted, as he is permitted to do, the ineffective assistance of his appellate counsel. *See Gravley*, 87 F.3d at 785 ("Attorney error that amounts to ineffective assistance of counsel can constitute 'cause.'"). The district court then determined that because a federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the claim was itself presented to the state court as an independent claim, it was required to first determine whether Carpenter's ineffective assistance of appellate counsel claim had been preserved for habeas corpus review. J.A. at 817. The court next applied the *Maupin* test for procedural default to the ineffective assistance of appellate counsel claim, and determined that this claim had not been waived because the state procedural bar (Ohio R. App. P. 26 (B)) was not an adequate state ground upon which to deny federal habeas relief. Thus, the court determined that the ineffective assistance of Carpenter's appellate counsel could be utilized to establish cause for Carpenter's failure to raise the sufficiency of evidence claim on direct appeal, and after considering the claim, determined that Carpenter's counsel was constitutionally ineffective. The district court, however, declined to decide the sufficiency of the evidence claim, finding that its resolution of

the ineffective assistance of appellate counsel claim, i.e. by ordering the state court to reinstate Carpenter's appeal, rendered the sufficiency of the evidence claim moot.

Carpenter argues that the district court erred initially by determining that the cause for his procedural default of his sufficiency of evidence claim (here ineffective assistance of appellate counsel) must itself be subjected to a procedural default analysis before it may constitute cause. He argues that the Supreme Court's decision in *Murray v. Carrier*, 477 U.S. 478 (1986), only imposed an exhaustion requirement on the cause asserted by the habeas petitioner in connection with the procedural default of the primary habeas claim. We agree.

Carpenter is correct in that the district court erroneously conflated the exhaustion requirement with the procedural default or waiver rule. The two inquiries are analytically distinct. *See Meeks v. Bergen*, 749 F.2d 322, 324 (6th Cir. 1984) (noting that "the question of whether a respondent is barred from litigating in a federal habeas corpus proceeding constitutional claims that were forfeited before the state court is distinct from the issue of exhausted state remedies"); *see also Engle v. Isaac*, 456 U.S. 107, 125-26 n. 28 (1982) (finding that waiver is separate from the question of exhaustion and exhaustion simply requires a petitioner to exhaust those remedies "available in the court of the State"). In *Murray*, the Court held that an ineffective assistance of appellate counsel claim must merely be presented to the state courts as an independent claim, before it can be used to establish cause for the state procedural default of a separate claim. *Murray*, 477 U.S. at 488-89. In so doing, the Court stated:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause -- a question of federal law-- without deciding an independent and unexhausted constitutional

> claim on the merits. But if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation' and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

Id. (citations omitted). A careful reading of *Murray* makes clear that the Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented.

"Th[is] exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Significantly, "[t]o exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion." *Id.* at 883; *see also Rudolph v. Parke*, 856 F.2d 738, 739 (6th Cir. 1988) ("It is settled law in this circuit that a constitutional claim which is presented to the state courts, regardless of whether they address and dispose of it, will satisfy the exhaustion requirement."). Furthermore, exhaustion applies even if a claim was procedurally defaulted in state court, because in such cases there are no longer remedies available for the petitioner to exhaust. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Engle*, 456 U.S. at 125-26 n.28 (1988).

Here, the state expressly conceded that Carpenter exhausted his ineffective assistance of appellate counsel claim. J.A. at 16. Carpenter presented his ineffective assistance of appellate counsel claim in his state court petition to reopen his direct appeal, and thus provided the state court with the first opportunity to determine the claim. When this petition was denied, he then appealed that denial to the Ohio Supreme Court. True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay. Carpenter, however, has exhausted all available state remedies for the claims. While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted. Put another way, the Supreme Court simply requires exhaustion of the ineffective assistance of counsel claim in order for it to constitute cause. The claim must be presented to the state courts, and all available remedies foreclosed, or the exhaustion requirement will not be met. Once all available remedies in state court are precluded and the state court may no longer pass on the claim, however, it is exhausted and may be utilized as cause. There is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim. *Cf. Meeks*, 749 F.2d at 325-26 (finding that a petitioner's habeas claims were exhausted when the petitioner joined the claims in an application for delayed appeal in state court, even though the claim was ultimately denied in state court due to a procedural default).

We do note that, although our review of the issue has not found a large number of cases directly addressing the issue, the Second and Seventh Circuits have considered the issue in slightly different contexts. *See, e.g., Reyes v. Keane*, 118 F.3d

136, 139-40 (2d Cir. 1997) (habeas petitioner who fails to raise a claim of ineffective assistance of trial counsel in state court may not present that claim as cause for procedurally defaulted habeas claim); *Lemons v. O'Sullivan*, 54 F.3d 357, 360-61 (7th Cir. 1995) (same). Those cases are distinguishable from the present case, for in both cases the petitioner completely failed to raise the ineffective assistance claim in state court. Here, however, Carpenter raised the claim in the primary avenue available to him under Ohio law (application to reopen his direct appeal). Hence, Carpenter provided the state court with the first opportunity to address the claim, although the court declined to do so on a procedural basis. Therefore, we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray*. Under a broad reading of *Murray*, we note that it probably would be insufficient, as the Seventh and Second Circuits have held.

Therefore, we conclude that the district court erred by finding that before it could consider whether the ineffective assistance of Carpenter's appellate counsel established cause for the state procedural default of Carpenter's sufficiency of the evidence claim, it must first determine whether the ineffective assistance of appellate counsel claim was itself procedurally defaulted, rather than simply exhausted. Principles of comity do not require placing a procedural default analysis on claims asserted as cause. We believe that the exhaustion requirement mandated by *Murray* is sufficient, and ensures that the state court has the first opportunity to hear such claims. Moreover, as noted earlier, a petitioner will be effectively "punished" for procedurally defaulting the ineffective assistance claim by only being able to assert it as cause for a procedural default and not being permitted to assert it as an independent habeas claim. The Supreme Court in *Murray* did not implement a procedural default requirement for claims asserted as cause, and until it does, we see no reason to engraft such a requirement on our own.

Once shown to be exhausted, the ineffective assistance of appellate counsel could be properly utilized as cause for the default of the sufficiency of the evidence claim, and the court was then required to continue the cause and prejudice analysis

by determining whether the ineffective assistance of appellate counsel rose to the level of a constitutional violation, thereby satisfying the cause element for excusal of state procedural default. *See, e.g., Rust*, 17 F.3d at 161 (noting that attorney error may constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir. 1993). In order for ineffective assistance of appellate counsel to rise to the level of a Sixth Amendment violation, the performance of Carpenter's counsel: 1) must be deficient, in that it is below an objective standard of reasonableness, and 2) this deficient performance must have prejudiced his appeal. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985); *cf. also Strickland*, 466 U.S. at 688, 694; *West*, 73 F.3d at 84. A petitioner may establish prejudice by demonstrating that there is a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Carpenter argues, and the district court determined below, that his appellate counsel's failure to raise the sufficiency of the evidence on direct appeal, and only raising the significantly weaker claim that Carpenter was entitled to parole after twenty rather than thirty years, was constitutionally deficient.

Under normal circumstances a plea of guilty precludes the defendant from attacking the sufficiency of the evidence under Ohio law. *See State v. Hertz*, 135 N.E.2d 781 (Ohio Ct. App. 1954)(per curiam). Ohio law, however, requires that a party who pleads guilty to aggravated murder appear before a three-judge panel which must "examine the witnesses, determine whether the accused is guilty of aggravated murder . . . and pronounce sentence accordingly." O.R.C. § 2945.06. Challenges to the sufficiency of the evidence are therefore expressly permitted on aggravated murder charges. *See State v. Taylor*, 285 N.E.2d 89, 96 (Ohio Ct. App. 1972); *see also State v. Leasure*, No. 1755, 1992 WL 174663 (Ohio Ct. App. July 22, 1992) (challenging the sufficiency of the evidence after guilty plea). In addition, the Ohio Supreme Court has recently affirmed that a guilty plea conviction supported only by the prosecution's recitation of the facts "does not satisfy the evidence requirements of Crim. R. 11 and R.C. 2945.06." *State v. Green*, 689 N.E.2d 556, 559 (Ohio 1998). In *Green*, a

unanimous court held that during a culpability hearing on a guilty plea, the three-judge panel must examine witnesses, and in that case found that because Green's conviction was not supported by any evidence other than the prosecution's factual recitation, it must be reversed and remanded for a new trial. *Id.* at 559-60.

As an additional point, we note that although *Green* was decided after Carpenter raised his claims in state court, application of the rule pronounced in *Green* to this case does not present a retroactivity problem under *Teague v. Lane*, 489 U.S. 288, 301 (1989). The Ohio Supreme Court's decision in *Green* does not constitute a "new rule," nor does it create a new constitutional right as contemplated by *Teague*. Indeed, *Green* relies upon the plain language of O.R.C. § 2945.06, which has been in effect since 1991, and the Ohio Supreme Court's decision in *State v. Post*, 513 N.E.2d 754, 756 (Ohio 1987). Moreover, *Green* specifically notes the "inherent dangers" in relying solely on the prosecutor's recitation of the facts considering the well-settled principle that "a statement of facts by a prosecutor does not constitute evidence." *Green*, 689 N.E.2d at 559 (citing *State v. Davis*, 581 N.E.2d 1362, 1373 (Ohio 1991)). Finally, although *Green* was a state law ruling, it certainly has constitutional import, for due process requires that a state criminal conviction be supported by sufficient and adequate evidence on the elements of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979). Consequently, application of the standards most recently articulated in *Green* neither "breaks new ground [nor] imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

The district court in the case *sub judice* noted that a reasonably knowledgeable criminal defense attorney would have known that the sufficiency of the evidence could be challenged following a guilty plea to aggravated murder, and that the specific facts of Carpenter's case warranted a sufficiency of the evidence challenge on appeal. We agree. First, since *Taylor* in 1972, it has been well-established law in Ohio that the sufficiency of the evidence may be challenged on the appeal of an aggravated murder conviction. Second, Carpenter never wavered from his protestations of innocence,

only entering a conditional guilty plea, and only in order to avoid the death penalty. Finally, the only information before the panel was the prosecution's recitation of the facts, which as noted previously is not evidence. *See Green*, 689 N.E.2d at 559; *Davis*, 581 N.E.2d at 1373. Here, no witnesses were called as required by Ohio Rev. Code § 2945.06, and no independent evidence was submitted. Carpenter's case mirrors that of *Green* where guilt was established only through the prosecution's recitation of the facts, and the conviction was reversed on appeal.[11] Therefore, the facts of Carpenter's case clearly supported a sufficiency of the evidence challenge and it is unfathomable why Carpenter's counsel failed to raise a sufficiency of the evidence claim on appeal. We find that his complete failure to raise such an integral part of Carpenter's case and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective. *See, e.g., Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (noting that although tactical decisions do not make out a claim for ineffective assistance, the failure to raise a significant constitutional claim may); *Clemmons v. Delo*, 124 F.3d 944, 953-54 (8th Cir. 1997) (finding ineffective assistance of appellate counsel where appellate counsel failed to raise obvious claim on direct appeal); *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead bang winner" claim on appeal was constitutionally ineffective assistance of appellate counsel even though other strong claims were raised); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (noting that petitioner may establish ineffective assistance of appellate counsel if he shows that counsel ignored significant obvious issue while pursuing weaker claims); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (finding ineffective assistance of appellate

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[11] A prosecution's recitation of the facts may be considered evidence with the explicit consent of the defense. *See Post*, 513 N.E.2d at 766. The Ohio Court of Appeals on Carpenter's application to reopen his direct appeal seemed to imply that his counsel's decision to neither admit nor deny these facts was such explicit consent, but did not rely on that basis for denying Carpenter's application. J.A. at 186-87. In light of the fact that defense counsel in *Green* had made no such stipulation, the Ohio Supreme Court expressly declined to reconsider *Post*. *Green*, 689 N.E.2d at 559. Neither party in this case thoroughly briefed the issue on appeal, and the district court did not address it below. Upon remand, the district court may rule on the issue.

counsel when counsel failed to raise substantial claim but instead raised weaker one); *Matire v. Wainright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (same). Thus, Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal and because, as noted, the claim is clearly a viable one, he has also established prejudice from his counsel's failure to raise the claim.[12] Accordingly, the ineffective assistance of Carpenter's appellate counsel excused his failure to raise the sufficiency of the evidence claim on direct appeal in state court.[13] *Cf. Gravley*, 87 F.3d at 786.

Upon establishing that Carpenter had sufficiently asserted cause for procedural default of his insufficiency of the evidence claim, the district court determined that the appropriate remedy would be to issue the writ conditioned upon the state court reinstating Carpenter's direct appeal. We agree that a conditional writ is the appropriate remedy in this case. We conclude, however, that because the state court has already made its position concerning Carpenter's appeal relatively

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[12] Although we find that Carpenter has established prejudice from the failure to raise the sufficiency of the evidence on appeal, in that there is a reasonable probability that the result of the proceedings may have been different, we do not decide the claim here.

[13] Although reaching the same conclusion as this court, that ineffective assistance of appellate counsel excused Carpenter's failure to raise the sufficiency of the evidence claim in state court, the district court's analysis was different. The district court found below that the ineffective assistance of counsel claim may constitute cause for the state procedural default of the sufficiency of the evidence claim, even though it too had been procedurally defaulted in state court, because the state court rule utilized as a basis for barring the ineffective assistance of appellate counsel claim, Ohio R. App. P. 26(B), was not an adequate and independent state ground to foreclose relief. The district court found that the good cause requirement of the rule had been inconsistently applied in the state courts. While we agree that it appears that the good cause requirement has not been uniformly applied in state court, we need not reach the issue because of our ruling that in determining whether the ineffective assistance of appellate counsel could constitute cause for the default of the sufficiency of the evidence claim, the district court was not required to determine whether it was procedurally defaulted, but merely whether it had been exhausted. Our analysis of whether the ineffective assistance of appellate counsel claim rose to the level of a constitutional violation, however, follows that of the district court below.

clear, ordering the state court to reinstate the direct appeal would simply prolong resolution of this case. If and when the state court denied the appeal, Carpenter would simply file a successive habeas petition reasserting his claims and again requesting federal review. Considering that Carpenter's initial complaint was that his culpability hearing went awry, we find that the more appropriate resolution here is for the district court to issue the writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law.

III.

For the foregoing reasons, we **AFFIRM** the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but **REMAND** the case to the district court for the imposition of a remedy consistent with this opinion. Our resolution of the cross-appeal in Carpenter's favor renders moot the State's direct appeal of the district court's grant of a conditional writ of habeas corpus to Carpenter.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

v.

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

[Filed: March 24, 1999]

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

No. 98-2060

IN THE SUPREME COURT OF THE UNITED STATES

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

[Filed: November 8, 1999]

ORDER ALLOWING CERTIORARI

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

November 8, 1999

DEC 23 1999

(6)

No. 98-2060

Supreme Court, U.S.
FILED
DEC 23 1999
CLERK

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another habeas claim when the ineffective-assistance claim is itself procedurally defaulted.

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ON WRIT OF CERTIORARI
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals, *see* Joint Appendix (J.A.) 51-66, is reported at 163 F.3d 938. The opinion of the district court (J.A. 32-50) is unreported. The opinion of the Ohio Supreme Court (J.A. 21-22) is reported at 74 Ohio St. 3d 408, 659 N.E.2d 786. The opinion of the Ohio court of appeals (J.A. 17-20) is unreported. Citations to these opinions in this brief refer to the copies contained in the Joint Appendix, as explained in the Table of Contents therein.

JURISDICTION

The court of appeals entered its judgment on December 18, 1998. A petition for rehearing was denied on March 24, 1999. J.A. 67. The petition for a writ of certiorari was filed on June 22, 1999, and was granted on November 8, 1999. J.A. 68. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

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(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State

corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

The complete text of the rule is reproduced in an appendix to this brief.

STATEMENT

1. State court proceedings. Respondent Robert W. Carpenter pleaded guilty to the crimes of aggravated murder and aggravated robbery in an Ohio trial court in 1990. Those charges stemmed from the murder and robbery of 73-year-old Thelma Young, who had been bludgeoned to death with a blunt object in her Columbus, Ohio home on the evening of October 5, 1988.

Carpenter entered his guilty pleas in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970).[1] Though he claimed that he had not committed the crimes charged in the

[1] Carpenter's pleas were conditional. That is, the prosecution agreed that he could withdraw his guilty pleas and go to trial if the three-judge panel that accepted his pleas elected to impose the death penalty after hearing from both parties during the mitigation hearing.

indictment, there was – as his lawyers explained to the state trial court, and as he agreed – "a very strong likelihood that he would be found guilty." (Transcript of 3/29/90 plea hearing at 14, filed as record entry #5 in the district court.)[2] The prosecution gave a detailed statement of the facts to the trial court (in this case, a three-judge trial-court panel). That statement fills 30 pages of transcript in the record of the state-court proceedings. Following that statement, Carpenter's counsel declined to add anything further or contest the statement.

The three-judge panel then accepted Carpenter's guilty pleas, unanimously finding beyond a reasonable doubt that he had indeed purposely caused the death of Thelma Young and had committed a robbery in her home. (J.A. 9-16; Tr. of 3/29/90 plea hearing at 71-72, filed as record entry #5 in the district court.) After conducting a sentencing hearing at which a total of 21 witnesses testified for either the prosecution or for Carpenter about various aggravating and mitigating factors surrounding his crimes and his social

[2] Carpenter has never denied that he was in Thelma Young's house at the time of the murder, or that money was stolen from her bedroom. The day after the murder and robbery, Carpenter phoned 911 to report that he knew some information about the crimes, and later that day told the police that three men had kidnapped him at gunpoint, taken him to the victim's home, and then killed her in her hallway after locking him in the bathroom. The men then fled, according to Carpenter, and he found Thelma Young dead on the floor with a screwdriver in her mouth. Police found no evidence supporting that story, but did find blood spatters matching the victim's blood type on Carpenter's pants and shirt, as well as blood on his socks and shoes. The lenses from Carpenter's eyeglasses were found at the crime scene, and a bloody screwdriver was found in the trunk of his car. (Tr. of 3/29/90 plea hearing at 41-70, filed as record entry #5 in the district court.)

history, the three-judge panel imposed a penalty on Carpenter of life imprisonment with parole eligibility after 30 years.

Carpenter appealed, through counsel, alleging that the evidence presented at the sentencing hearing established that he should have received a sentence of life imprisonment with parole eligibility after 20 years rather than 30. The appeal did not challenge the validity of Carpenter's guilty pleas themselves, the sufficiency of the prosecution's evidence against him, or the way in which the prosecution presented the facts to the trial court before that court accepted his guilty pleas. The court of appeals affirmed Carpenter's sentence, *see* 1991 WL 35009 (March 12, 1991), and Carpenter did not appeal that decision to the Ohio Supreme Court.

The following year, Carpenter filed a *pro se* petition for post-conviction relief in the state trial court. The trial court dismissed the petition on June 18, 1992, finding it too conclusory to state any valid grounds for relief under O.R.C. 2953.21, Ohio's post-conviction relief statute. The state court of appeals affirmed the dismissal, *see* 1992 WL 361815 (December 3, 1992), and the Ohio Supreme Court declined to review the case. *State v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this brief. The Ohio Supreme Court adopted that rule after holding that, in Ohio, a claim of ineffective assistance of appellate counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992).

The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims. Some Ohio appellate courts, including the one that had decided Carpenter's original direct appeal, determined that, for direct appeals resolved before the new rule took effect on July 1, 1993, the application deadline under the rule was 90 days after its effective date.

On July 15, 1994 – over a year after the new 90-day rule took effect – Carpenter (with the assistance of new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals.[3] Carpenter alleged that his appellate counsel in his original appeal in 1990-91 had provided ineffective assistance by failing to challenge the sufficiency of the evidence presented by the prosecution at his guilty plea hearing.[4] The state court

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[3] Although the state court of appeals said in its opinion that Carpenter's Rule 26(B) application was filed *pro se*, J.A. 17, it was actually prepared with the assistance of counsel. The confusion is understandable, as the attorney's name appears on the cover of the Rule 26(B) application, but Carpenter himself signed the document.

[4] The nature of the "sufficiency" claim that Carpenter now says should have been raised on direct appeal appears somewhat unclear. He may intend to challenge the strength of the evidence that forms the factual basis of the guilty pleas. (As we understand it, this claim would allege that, while the evidence clearly links him to the crimes, it is not enough to show his intent to commit murder.) Or he may be attacking the method by which the prosecution put this evidence before the three-judge trial court that accepted his guilty pleas. (In this regard, the claim would be that the State should have presented sworn testimony rather than an unsworn statement of facts by the prosecutor, though Carpenter

of appeals did not reach the merits of Carpenter's Rule 26(B) application, however, and thus the court did not decide the merits of *either* the claim of ineffective assistance of appellate counsel *or* the underlying sufficiency claim that counsel allegedly should have raised. Instead, the court dismissed the application on September 29, 1994, finding that Carpenter had missed the 90-day window for filing such a claim once Rule 26(B) took effect on July 1, 1993. J.A. 17-20.[5] The appeals court found that Carpenter's reason for filing a late request to reopen his direct appeal – that he was not aware in 1990 that he could challenge the sufficiency of the evidence on direct appeal – was not "good cause" for his untimely application in 1994.

Carpenter appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application without reaching the merits of the ineffective-assistance-of-appellate-counsel claim. Like the state court of appeals, the Ohio Supreme Court found that Carpenter had simply missed the deadline for raising such a claim in Ohio's courts. *State v. Carpenter*, 74 Ohio St. 3d 408, 659 N.E.2d 786 (1996) (*per curiam*). J.A. 21-22. The Ohio Supreme Court's one-line order reads simply: "The judgment of the court of appeals is

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and his trial counsel did not object to the latter approach at the plea hearing.) Or perhaps he means both. These issues, however, have never been resolved, and may be addressed on remand, if necessary.

[5] The Ohio Supreme Court later ruled that even those defendants who filed Rule 26(B) applications within 90 days after July 1, 1993 had to show "good cause" for not seeking appellate relief earlier under the predecessor provision of Rule 26(B). *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995). In any event, Carpenter's July 15, 1994 application for reopening of his direct appeal was untimely even under the court of appeals' more lenient approach.

affirmed on authority of *State v. Reddick*." *Id.* at 22. The reference to *Reddick* (*see* n.5, above) makes clear that the state supreme court, like the court of appeals, never addressed the merits of Carpenter's ineffective-assistance claim, and dismissed the Rule 26(B) application solely on procedural grounds.

2. Federal habeas proceedings. On May 3, 1996 (shortly after the effective date of AEDPA), Carpenter filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court.[6] He alleged (1) insufficiency of the evidence supporting his plea and sentence, in violation of the Fifth and Fourteenth Amendments; (2) ineffective assistance of appellate counsel, in violation of the Sixth and Fourteenth Amendments; and (3) the denial of a meaningful opportunity for state-court review of his ineffective-assistance claim, in violation of the Fifth and Fourteenth Amendments. J.A. 23-31.

The district court determined that Carpenter had procedurally defaulted on his sufficiency-of-the-evidence claim by failing to raise it in his direct appeal, and the court found that this default was an adequate and independent state ground that foreclosed federal-court review of the claim. J.A. 40. Likewise, the district court found that Carpenter had failed to comply with Ohio's procedural rule, Rule 26(B), for raising ineffective-assistance-of-appellate-counsel claims. *Id.* at 41-42. However, in a ruling that the Sixth Circuit did not later reach on appeal, the district court concluded that Ohio's appellate courts varied in their application of the "good cause" exception to Rule 26(B)'s 90-day time limit. *Id.* at 42-43. For that reason, said the district court, Carpenter's procedural default in raising his ineffective-

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[6] AEDPA does not address the question presented in this case.

assistance claim did not pose an adequate state ground barring federal-court review of the claim. *Id.* at 42-44.[7]

Reaching the merits, then, of Carpenter's ineffective-assistance claim, the district court found that he was entitled to a writ of habeas corpus on that issue, and so granted the writ, conditioned on the reopening of Carpenter's direct appeal in the state appellate court, during which he would be permitted to challenge the sufficiency of the prosecution's evidence against him. Given this relief, the district court found it unnecessary to rule on the first and third claims in Carpenter's habeas petition.

Carpenter and the warden ("the State") both appealed. The court of appeals held that a procedurally defaulted ineffective-assistance claim, when serving as "cause" for the procedural default of some other habeas claim (here, the sufficiency claim), need not itself be "subjected to a procedural default analysis before it may constitute cause." J.A. 58. Carpenter had exhausted his ineffective-assistance-of-appellate-counsel claim by filing his Rule 26(B) application for reopening the direct appeal in 1994, and the court of appeals required no more. "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 60. The critical inquiry, however, according to the court of appeals, was simply whether Carpenter had *exhausted* his ineffective-assistance claim (by

[7] If this Court reverses the judgment below, the court of appeals on remand could consider this alternative ground, which its opinion did not reach. J.A. 65 n.13. We would, of course, continue to defend Rule 26(B)'s fixed deadline, with its "good cause" safety valve, against the charge of inadequacy for federal habeas purposes.

trying to raise the claim under Rule 26(B)), not whether the claim itself was *procedurally defaulted* (because it was raised too late).

> While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted.

Id. at 60.

Having held that Carpenter need not show any cause for the procedural default of his ineffective-assistance claim, the court of appeals then considered whether Carpenter's appellate counsel had provided constitutionally sufficient assistance to him in the direct appeal. At this point, the court of appeals' opinion becomes somewhat confusing. For several paragraphs (J.A. 62-65), the court of appeals discusses challenges to guilty pleas under Ohio law, and appears to conclude that Carpenter has a strong argument – based primarily on a recent opinion of the Ohio Supreme Court, *State v. Green*, 81 Ohio St. 3d 100, 689 N.E.2d 556 (1998) – that state law required the prosecution to support Carpenter's guilty plea with witness testimony rather than just the unsworn statement of a prosecutor. (J.A. 64.) The court does go so far as to say specifically: "We find that

[appellate counsel's] complete failure to raise such an integral part of Carpenter's case[,] and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective." J.A. 64. But the court's opinion also has a footnote (*id.* n.11) that acknowledges that Carpenter's case may be distinguishable from *Green*, for while Carpenter's state court trial counsel apparently accepted the method by which the prosecution presented the factual basis for his guilty pleas (as the state court of appeals indicated in denying his Rule 26(B) application, *see* J.A. 19), there was no such stipulation in *Green*.[8]

[8] Furthermore, the court of appeals indicated that "[u]pon remand, the district court may rule on th[is] issue." (J.A. 64 n.11.) It is unclear what the court of appeals meant in this respect. Perhaps the court meant that a closer look at the relationship of Carpenter's case to *Green* would show that Carpenter's appellate counsel was not ineffective after all (as we believe), though that seems to conflict with the relief ordered, and with the court's statement that counsel's performance on state-law issues was deficient. Or perhaps it meant that the district court could determine whether anything at the plea hearing violated *federal* due process, as Carpenter alleged in the first count of his habeas petition. Or perhaps the court meant that the district court had authority to decide whether the prosecutor's method of presenting the facts at Carpenter's plea hearing violated *state law*, and that the district court could grant federal habeas relief for a state-law violation. But that last reading, though plausible from the face of the footnote, cannot be the case, as it is well-settled that a federal habeas court has no such power. *Engle v. Issac*, 456 U.S. 107, 119-20 (1982). In any case, the proper characterization of the footnote can be resolved on remand. (The district court has since recognized the confusion. *See* 5/18/99 Order directing Carpenter to articulate his position regarding the inconsistency between Sixth Circuit's mandate and footnote 11 of that court's opinion. J.A. 4.)

In any event, the court of appeals concluded that "Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal," and the court also found prejudice from that failure. J.A. 65. But having found a way to reach the merits of the defaulted sufficiency claim in habeas, the court of appeals did not in fact resolve the merits of that claim, stating that "we do not decide the claim here." (J.A. 65 n.12.) The court of appeals simply directed the district court to issue a writ of habeas corpus "conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law." *Id.* at 66.[9]

This Court then granted certiorari to review the court of appeals' ruling that a habeas petitioner need not show cause for the procedural default of a habeas claim when that claim is invoked as the cause for some other procedural default.

SUMMARY OF ARGUMENT

In addition to the recent authority of *Stewart v. LaGrand*, 119 S. Ct. 1018, 1021 (1999) (*per curiam*), several basic and well-settled propositions collectively show that the court of appeals erred in this case. First, since *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court has consistently held that all procedurally defaulted claims presented for federal-court review under 28 U.S.C. 2254 must satisfy the cause-

[9] It is perplexing how the court of appeals could have ordered habeas relief without deciding the merits of the *sufficiency* claim, since the court of appeals explicitly acknowledged that "the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim," J.A. 60, and so clearly did not grant habeas relief on *that* claim.

and-prejudice test. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Issac*, 456 U.S. 107, 129 (1982). Second, this Court has specifically applied this cause-and-prejudice analysis to ineffective-assistance-of-counsel claims, including claims concerning counsel's performance during a criminal defendant's direct appeal. *See Coleman*, 501 U.S. at 755. Third, in *Carrier*, 477 U.S. at 492, the Court also held that, in order for the deficient performance of appellate counsel to serve as cause for another procedural default, this attorney misfeasance must be sufficiently egregious to constitute a Sixth Amendment violation, according to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Fourth, the Court further held in *Carrier* that an ineffective-assistance claim serving as cause must satisfy the exhaustion requirement of section 2254. *See* 477 U.S. at 489.

These propositions, virtually as a matter of deductive reasoning, yield the conclusion that a procedurally defaulted ineffective-assistance claim must satisfy cause-and-prejudice analysis to serve as cause for the procedural default of some other habeas claim. To start, the two holdings of *Carrier*, when put together, show that an ineffective-assistance claim must have been *presented* to the state courts, and be *meritorious* "as an independent claim" for a federal habeas court to consider the ineffectiveness as an excuse for the procedural default of another claim. *Id.* And because *Carrier* required presentment to preserve the state courts' *opportunity* to review a claim first, *Carrier* must mean that the default doctrine applies no less than does exhaustion, for the state courts' opportunity is foreclosed if the prisoner does not *properly* present his claims in state court before seeking habeas relief. If one cannot deduce this principle from *Carrier* alone, then one surely can do so by adding to the equation the unanimous view, expressed just last Term in

O'Sullivan v. Boerckel, 119 S. Ct. 1728 (1999), that the exhaustion and procedural default doctrines work together to require prisoners not only to *present* their habeas claims to state courts, but also to do so *properly* in compliance with the State's legitimate procedural rules. *See id.* at 1734 (majority opinion); *accord id.* at 1737 (dissenting opinion).

In sum, then, *Carrier* and *O'Sullivan* show that a federal court must have the power to grant habeas relief for a *Strickland* violation – *both* because the *Strickland* claim is meritorious *and* because the *Strickland* claim is properly before the court under section 2254 – in order for the federal court to use that claim as the cause for overcoming a State's independent and adequate procedural bar regarding another claim. But if (according to *Carrier* and *O'Sullivan*) an ineffective-assistance claim cannot serve as cause unless it is independently cognizable as a basis for habeas relief, and if (as *Coleman* held) a *procedurally defaulted* ineffectiveness claim is *not* independently cognizable in federal habeas *unless* it satisfies the cause-and-prejudice test, then it seems to follow necessarily that a procedurally defaulted ineffective-assistance claim cannot serve as cause for another procedural default unless it too satisfies the cause-and-prejudice test.

But more than just deductive logic supports this result. It also makes good sense – in light of the basic purposes of the procedural default doctrine – that a defaulted ineffective-assistance claim not qualify as cause for another default unless there is also cause for that default as well. The procedural default doctrine, essentially, is designed to assure that federal habeas review of claims challenging state-court convictions honor and respect state-law procedural rules that constitute independent and adequate barriers to state-court review of the same claims. It also ensures that prisoners who

do seek federal habeas relief first give state courts a *true* opportunity to review the merits of their federal claims. Only if there is a good reason, for which the convicted prisoner should not be responsible – "cause" – will a federal habeas court have the power to overlook the independent and adequate procedural bar (and even then, only if the prisoner can also show adequate "prejudice" from enforcement of the procedural bar). *Strickler v. Green*, 119 S. Ct. 1936, 1952 (1999).

This principle applies just as much to a claim asserted as the good reason, the cause, for breaching another state-law procedural rule as it does to that initial procedural breach itself. In other words, when a convicted prisoner violates a State's deadline for presenting a claim intended to excuse a previous missed deadline, the prisoner should be expected to show a good reason for missing this second deadline as well as the first.

This rule does not mean that the default of an ineffective-assistance claim *necessarily* and *always* precludes its use as cause to excuse another default. Instead, it means only that, even when used for cause, the defaulted claim must be subject to the same rules as any other defaulted claim presented to a federal habeas court. In sum, our position is simply this: missing the deadline for offering an excuse for an earlier missed deadline likewise requires an excuse.

ARGUMENT

Like so many of this Court's decisions interpreting and applying the statutes and rules that govern federal habeas claims, "[t]his is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), for as was true in that case, this one too "concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.*

I. The Court Of Appeals' Holding Is Inconsistent With This Court's Decision In *Stewart v. LaGrand.*

According to the court of appeals, a procedurally defaulted ineffective-assistance claim may serve as the "cause" for the procedural default of some other federal habeas claim without any showing of cause for the procedural default of the ineffective-assistance claim itself. In short, said the Sixth Circuit, the cause-and-prejudice test does not apply when an ineffective-assistance claim, which is itself procedurally barred from habeas review, serves only the derivative purpose of excusing the procedural default of another habeas claim. Yet that is not what this Court said just last Term in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999), a *per curiam* summary reversal:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause [for the procedural default of his Eighth Amendment claim], also fails. . . . [T]he ineffective assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to

> a state procedural rule . . . and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review.

119 S. Ct. at 1021. (In addition to procedurally defaulting on his ineffective-assistance claim in state court, the habeas petitioner in *LaGrand* also waived that claim in the federal district court. *Id.*)

As *LaGrand* now shows, federal habeas courts should apply the cause-and-prejudice test to *every* procedurally defaulted habeas claim, whether the defaulted claim is presented as a stand-alone claim or is offered merely as the cause for some other procedural default. The *LaGrand* approach embodies a proper respect for state procedural rules, whereas the judgment below does just the opposite, letting a habeas petitioner bring a defaulted claim to federal court for review when the State itself has declined to reach the merits of the claim in light of an independent and adequate state procedural bar. The Court should adhere to *LaGrand*, for as we show below, that decision – not the judgment below – is consistent both with the Court's habeas decisions of the past 30 years and with the principles of federalism and comity that underlie them.

II. All Procedurally Defaulted Claims, Including Ineffective-Assistance Claims, Are Subject To The Cause-And-Prejudice Test.

When a state prisoner fails to follow a State's procedural rules for raising federal constitutional claims, he frustrates the State's legitimate interest in resolving those claims in a particular forum at a specified time, and the Court has therefore long encouraged prisoners to go first to state

courts to remedy constitutional errors – and to do so when and how the States demand. *See Coleman*, 501 U.S. at 732 ("a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance").

To promote that important comity interest, the Court has consistently applied the cause-and-prejudice test to procedurally defaulted claims for over 20 years. *See Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Issac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). That test requires prisoners to explain why they failed to comply with state procedural rules in raising their federal constitutional claims in state court, because state rules "serve[] [the State's] strong . . . interests in the finality of its criminal litigation." *Coleman*, 501 U.S. at 746, citing *Wainwright*, 433 U.S. at 88-90. The cause-and-prejudice test's "presumption against federal habeas review of claims defaulted in state court" protects those important interests. *Coleman*, 501 U.S. at 747. "Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *Engle*, 456 U.S. at 128, and the cause-and-prejudice test serves an important gate-keeping function limiting those federal intrusions.

This Court, moreover, has been unambiguous in proclaiming that the cause-and-prejudice test applies "uniformly to all independent and adequate state procedural defaults." *Coleman*, 501 U.S. at 750-51. As the Court said in *Coleman*:

> We now make it explicit: In all cases in which a state prisoner has defaulted his

> federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[10]

Id. at 750. The rule is uniform, the Court further explained, because the State's interests are the same whenever a federal habeas court decides a claim that a state court could not reach because of a valid state procedural rule. *See id.* (identifying those state interests as "channeling the resolution of claims to the most appropriate forum," "finality," and "having an opportunity to correct its own errors").

The rationale that supports the cause-and-prejudice test – that prisoners ought not be free to raise in federal habeas those claims that "were not resolved on the merits in the state proceeding due to [the prisoner's] failure to raise them there as required by state procedure," *Wainwright*, 433 U.S. at 87 – applies no less to an ineffective-assistance claim than to any other. And no one has ever suggested that a procedurally defaulted ineffective-assistance claim is or ought to be subject to a different test. Indeed, in *Coleman* itself, this Court specifically applied the cause-and-prejudice test to procedurally defaulted ineffective-assistance claims, including a claim concerning the performance of *appellate* counsel. *See also LaGrand*, 119 S. Ct. at 1021 (ineffective assistance of trial counsel).

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[10] Carpenter has not invoked the "fundamental miscarriage of justice" exception in this case.

III. An Ineffective-Assistance Claim May Not Serve As "Cause" For A Procedural Default Of Some Other Claim Unless That Ineffective-Assistance Claim Is Itself Cognizable In Federal Habeas.

Both parties, like the court below, agree that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of some other habeas claim, just as the Court said in *Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default"). That rule makes eminent good sense, for "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.'" *Id.* at 488, citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

But to serve as cause for the procedural default of a habeas claim, an ineffective-assistance allegation must itself meet three critical tests. First, counsel's ineffective-assistance must have fallen below the standard set by the Sixth Amendment. Second, the ineffective-assistance claim must satisfy the exhaustion requirement. And third, the ineffective-assistance claim must have been *properly* presented to the state courts, and thus not be barred by an independent and adequate state ground. The court below agreed with the first two principles, but failed to appreciate the equally compelling force of the third.

A. Poor lawyering may not serve as cause unless it violates the Sixth Amendment.

"Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default." *Carrier*, 477 U.S. at 492. As the Court has made clear, "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Carrier*, 477 U.S. at 488. That is, a prisoner may point to his lawyer's ineffectiveness as cause for his failure to comply with a State's procedural rules only where the lawyer's "identified acts or omissions were outside the wide range of professionally competent assistance," and were the result of something less than "reasonable professional judgment." *Strickland*, 466 U.S. at 690. Mere "[a]ttorney ignorance or inadvertence is not 'cause'" where it does not rise to a Sixth Amendment violation. *Coleman*, 501 U.S. at 753.

B. To serve as cause, a *Strickland* claim must be exhausted.

Not only must a claim of ineffective-assistance offered as cause for the procedural default of another habeas claim rise to the level of a Sixth Amendment violation, but that claim of attorney error must also have been presented by the prisoner to his state courts for review there first. The Court said so explicitly in *Carrier*: "the exhaustion doctrine . . . generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Carrier*, 477 U.S. at 488-89.

The Court there also explained the rationale for this holding: "if a petitioner could raise his ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available." *Id.* at 489. Consequently, the Court concluded: "The principle of comity that underlies the exhaustion doctrine . . . holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Id.*

C. An ineffectiveness claim must be not only presented, but properly so, to a state court before serving as cause in federal habeas.

In imposing this exhaustion requirement for claims offered as cause, *Carrier* did not do so to the exclusion of the procedural default doctrine. On the contrary, the Court in *Carrier* had no occasion to consider the question presented in *this* case, because the ineffective-assistance claim *there* was *not* defaulted. Indeed, in *Carrier*, the State explicitly acknowledged that the prisoner in that case "could bring an ineffective assistance of counsel claim in the state courts to establish that his procedural default should be excused." *Carrier*, 477 U.S. at 483. Thus, the *Carrier* Court's discussion of the exhaustion requirement should be understood simply as the Court's identification of the particular procedural principle that was necessary to resolve that case. In no way was the Court's discussion of exhaustion intended to cast doubt on the applicability of the procedural default doctrine as well, where, as here, a defaulted ineffective-assistance claim is offered as cause for another default.

Indeed, quite the opposite: the reasoning of *Carrier* supports the more general proposition that an ineffective-assistance claim can serve as cause only when that claim has been *properly* presented to the state courts before being raised in federal habeas. The key idea in *Carrier* is that the state courts must be able to assess for themselves the merits of ineffective-assistance claims before they are considered in federal habeas. *See* 477 U.S. at 489. But state courts cannot assess for themselves the merits of an ineffective-assistance claim that is procedurally barred, and this is true even if the claim has been presented late to the state courts and thus satisfies the exhaustion requirement.

Consequently, the principles and policies that underlie *Carrier*'s exhaustion requirement dictate that the ineffective-assistance claim, to serve as cause, be one that the state courts could have decided on the merits. Indeed, only last Term did the Court reiterate: "we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts." *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1734 (1999) (emphasis added). Indeed, there was unanimity on this point: "A habeas petitioner who has concededly exhausted his state remedies must also have *properly* done so by giving the State a fair 'opportunity to pass upon [his claims].' *Darr v. Burford*, 339 U.S. 200, 204 (1950)." *Id.* at 1737 (Stevens, J., dissenting) (emphasis added).

As Justice Stevens explained in reasoning shared by all members of this Court, "[i]f we allowed state prisoners to obtain federal review simply by letting the time run on adequate and accessible state remedies and then rushing into the federal system, the comity interests that animate the

exhaustion rule could easily be thwarted." *O'Sullivan*, 119 S. Ct. at 1737 (Stevens, J., dissenting). *See also id.* at 1734 (majority opinion) ("As Justice Stevens notes, a prisoner could evade the exhaustion requirement – and thereby undercut the values that it serves – by 'letting the time run' on state remedies."). In thinking that exhaustion suffices to serve the principle of comity, without any need for the corollary doctrine of procedural default, the court of appeals simply missed this fundamental point. Indeed, it is no accident that both *Carrier* and *O'Sullivan*, at crucial junctures in their reasoning, quote from the same page of the Court's much earlier opinion in *Darr v. Burford*, 339 U.S. 200, 204 (1950). *Compare Carrier*, 477 U.S. at 489 with *O'Sullivan*, 119 S. Ct. at 1737 (Stevens, J., dissenting).

Both *Carrier* and *O'Sullivan* capture the same point – namely that state courts must have a genuine "opportunity to pass upon" a constitutional claim, and thus a genuine "opportunity . . . to correct a constitutional violation," before a federal court may consider that same claim. *Darr*, 339 U.S. at 204. This is the relevant principle of comity, and it provides the common foundation for both the exhaustion requirement and the procedural default doctrine. This same principle of comity also "holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Carrier*, 477 U.S. at 489. Thus, because comity requires exhaustion before a *Strickland* claim may serve as cause, comity also requires application of procedural default rules before the *Strickland* claim may serve as cause.

In its contrary holding, moreover, the court below in fact made the same kind of mistake that the Fourth Circuit made in the proceedings leading up to the Court's decision in *Carrier*. The court of appeals had said in that case that "[t]he

exhaustion requirement . . . pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Carrier*, 477 U.S. at 484 (quoting *Carrier v. Hutto*, 724 F.2d 396, 402 (4th Cir. 1983)). Substitute the words "procedural default" for "exhaustion" in that sentence, and we have the essence of the court of appeals' decision in this case.

But just as the Fourth Circuit was wrong with respect to exhaustion in *Carrier*, so too the Sixth Circuit is wrong with respect to procedural default here. The rationale supporting the Court's decision in *Carrier* applies no less to this case, for "[j]ust as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 731-32. Indeed, preventing federal habeas consideration of claims that state courts – because of valid procedural rules – could not have addressed themselves is the whole purpose of applying the independent-and-adequate-state-ground doctrine in habeas as well as on direct review. *Coleman*, 501 U.S. at 730.

IV. A Procedurally Defaulted Ineffective-Assistance Claim May Not Serve As "Cause" For The Procedural Default Of Another Habeas Claim, Unless There Is Also "Cause" For The Default Of The Ineffectiveness Claim Itself.

If the foregoing analysis of *Carrier* and *O'Sullivan* is correct, then an ineffective-assistance claim may not serve as cause for a procedural default unless the ineffectiveness claim itself satisfies procedural default analysis. But, of course, as *Coleman* tells us, a defaulted ineffective-assistance

claim, like any other kind of claim, cannot withstand this analysis unless the habeas petitioner shows cause and prejudice for *this* default. Thus, from these premises, it necessarily follows that a defaulted ineffective-assistance claim cannot serve as cause unless there is also cause for defaulting the ineffectiveness claim itself. Although this deductive reasoning should suffice to show that the court of appeals erred in its analysis of this Court's prior precedents, we do not rest our case on logic alone. On the contrary, the basic values that underlie the procedural default doctrine, as well as the inappropriate practical impact of the Sixth Circuit's decision, amply support the conclusion that this Court should reverse that decision.

The court below found that procedurally defaulted claims can serve as cause for other defaults because exhaustion alone is "sufficient, and ensures that the state court has the first opportunity to hear" those claims offered as cause. J.A. 61. Exhaustion, however, asks only whether state remedies are *still available* when a prisoner files in federal habeas, and so the exhaustion requirement is *technically* met whenever a prisoner has procedurally defaulted, as state court remedies are then no longer available. But, as we just demonstrated in the previous part of this brief, federal courts reviewing claims in habeas ask not only *whether* claims are exhausted, but also *how* the prisoner exhausted them. By permitting habeas petitioners to raise procedurally defaulted – albeit exhausted – claims as cause for other procedural defaults, the approach followed by the court of appeals actually rewards those prisoners who (by design or by mistake) simply run out the clock until the last available state court remedy is foreclosed. That option to bypass state court review without consequence is hardly consistent with the principles of comity and federalism that habeas courts ought to respect.

Here, though Robert Carpenter missed the State's deadline for raising an ineffective-assistance claim, the court below has used that defaulted claim to excuse another missed deadline, without asking Carpenter to justify the late filing of the ineffective-assistance claim itself. No sound rationale supports the court of appeals' view that he must justify the earlier default (of his sufficiency-of-the-evidence claim), but not his later default of the ineffective-assistance claim. Surely before raising his counsel's ineffective assistance as the cause for the earlier default, federal courts ought to require him to explain why he in turn missed the State's deadline for raising the ineffective-assistance claim itself. Had he met the State's deadline, he at least would have been entitled to a ruling on the merits of that claim. By filing late, he missed that opportunity, and federal courts ought to ask him to explain why.

Suppose that Carpenter defaulted on a particular claim in state court (as he in fact did) by failing to raise the claim in his direct appeal. But then suppose that he had complied with the State's deadline for raising an ineffective-assistance-of-appellate-counsel claim. This second step in our scenario, of course, Carpenter did not do. Had he done so, though, the state court of appeals would have addressed the merits of his ineffectiveness claim, and perhaps would have granted him relief. *See* Ohio App. R. 26(B) ("[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal"); *id.* ("[i]f the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment"). And even if the state court of appeals had not granted him relief, he could have sought further review of the ineffective-assistance claim on the

merits in the Ohio Supreme Court,[11] and ultimately could have petitioned for certiorari in this Court on the merits of his ineffective-assistance claim.

Assuming that our "hypothetical Carpenter" in the scenario described above had lost on the merits of his ineffective-assistance claim in this state-court process, he could then quite properly have headed next to federal court, and there asked that court in habeas to revive his defaulted sufficiency-of-the-evidence claim – by alleging that his ineffective appellate lawyer caused him to miss the opportunity to raise that sufficiency claim on direct review. *But that is just the relief that the "real Carpenter" in fact sought – and received – in the Sixth Circuit, despite having failed to comply with the deadline for the state court proceedings available to him that we describe above.* Though he did not properly take advantage of the opportunity Ohio offers for fixing ineffective-assistance violations, and did not give Ohio the opportunity to review that claim in the place and at the time that Ohio provides to prisoners for review of such claims, the real Carpenter is now no worse off than our hypothetical Carpenter, who did comply with the State's rules and did properly present the ineffective-assistance claim to his state courts for a decision on the merits.

Why should federal courts treat the two habeas petitioners just alike, when Ohio itself does not? Why should our real prisoner, who disregarded the State's rules by filing "the claim late, and according to the state court, without good cause for his delay," J.A. 60, be no worse off in

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[11] This review in the Ohio Supreme Court is mandatory in capital cases and discretionary in all others. Ohio Sup. Ct. Prac. R. II(1)(A).

federal court than the hypothetical prisoner, who complied with the State's rules and secured a decision on the merits of his claim in state court? By treating the two just alike, the court below created a marked "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." *Coleman*, 501 U.S. at 751. If Ohio may rightly require prisoners to raise ineffective-assistance claims by a particular time and in a particular forum, and properly treats those who comply with those rules differently from those who do not, then "[n]o less respect should be given to [those] state rules of procedure" by the federal courts in habeas. *Id.*

State procedural rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Carrier*, 477 U.S. at 490, for they "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). Ohio, like every State, sets deadlines for raising federal constitutional claims in order to protect "its important interest in finality," *id.* at 750, and to force prisoners to bring their claims to state court at a time and place where they can best be resolved on the merits. And because Carpenter failed to follow state procedural rules, the State has every right to regard his challenge to his counsel's effectiveness at an end – not because that claim has no merit (though we think that is true) but because he never presented that challenge in the way that Ohio's rules require. Those rules deserve no less respect from the federal judiciary than they receive in Ohio's courts, and the judgment below holding otherwise should be reversed.

When a prisoner can show cause for and prejudice from his procedural default of an ineffective-assistance claim, we readily concede that he then ought to be free to raise that claim as cause for some other procedural default. In that case, ineffective assistance (if it meets the *Strickland* standard) may be properly reviewed by federal courts, both as a habeas claim in its own right, and as the cause for some other procedural default. Our view, then, does not threaten the legitimate right of state prisoners to raise their habeas claims in federal court.

The cause-and-prejudice test, ultimately, boils down to a straightforward message from federal courts to state prisoners: "tell us why we should listen to you now when you could have fixed this problem elsewhere." That rule has long applied when a prisoner has missed one deadline, and it ought to apply just as strongly when he misses a second. If the prisoner *can* explain both missteps, then we agree that his claims deserve review in federal court. But by asking him to explain only the first misstep, the court below failed to honor "the concerns of comity and federalism" on which "the independent and adequate state ground doctrine is grounded." *Coleman*, 501 U.S. at 730.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted,

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December 1999

APPENDIX

Rule 26 of the Ohio Rules of Appellate Procedure provides as follows:

Rule 26. Application for reconsideration; application for reopening

(A) Application for reconsideration.

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;
(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.[;]
(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;
(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;
(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;
(b) Impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App. R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) [Ruling upon application for reconsideration.]

If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

Jan 21 2000

(7)

Supreme Court, U.S.
FILED
JAN 21 2000
CLERK

No. 98-2060

In The

Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,

Petitioner,

v.

ROBERT W. CARPENTER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as cause for the procedural default of another habeas claim when the ineffective-assistance-of-counsel claim is itself procedurally defaulted.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article III, Section 1 of the United States Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

3. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this merit brief.

5. Current and Former S. Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this merit brief.

STATEMENT OF THE CASE

On the evening of October 5, 1988, the body of 73-year-old Thelma Young was found in her Columbus, Ohio home by her son. Ms. Young was murdered, and money was allegedly missing from her home.

Although Respondent, Robert Carpenter, was arrested for Ms. Young's murder, he maintained his innocence. He was indicted by a Franklin County, Ohio grand jury on one count of aggravated murder with a death penalty specification pursuant to Ohio Rev. Code Ann. § 2903.01 (Anderson 1999) and one count of aggravated robbery pursuant to Ohio Rev. Code Ann. § 2911.01 (Anderson 1999).

Carpenter entered into a conditional plea agreement. He waived his right to a jury trial and pleaded guilty to the indictment while maintaining his innocence in accordance with the procedure approved of by this Court in *North Carolina v. Alford*, 400 U.S. 25 (1970). Carpenter entered his plea to avoid the death penalty. J.A. 48.

On March 29, 1990, the culpability hearing concerning Carpenter's guilty plea was conducted before a three-judge panel. At the culpability hearing, the prosecutor recited a statement of facts. Tr. 41-70; J.A. 48-49, 53. Carpenter refused to stipulate or adopt the statement of facts proffered by the prosecutor during the culpability hearing. Tr. 15-17 (Appendix A-6-A-8); J.A. 48-49.[1] Neither testimony nor physical evidence was introduced in support of the charges in the indictment. *See e.g.* Tr. 508 (Trial court denied prosecutor's request to admit photographs at the penalty phase because they were not evidence, properly marked and introduced at culpability phase.) Based on the prosecutor's statement of facts, the

[1] The Warden failed to challenge this district court finding in his appeal to the Sixth Circuit.

three-judge panel accepted Carpenter's guilty plea. Tr. 71-72.

At the penalty phase, Carpenter presented mitigating evidence for the trial court's sentencing consideration. Tr. 83-463. Carpenter was sentenced to life imprisonment with no possibility of parole for thirty years. J.A. 9-16.

Carpenter was appointed new counsel to pursue his direct appeal. Appellate counsel never met with Carpenter to discuss the case and never provided Carpenter with a copy of his trial transcript. Carpenter's Application for Reopening, p. 11 (Appendix A-11). Appellate counsel raised a single issue on appeal claiming that the trial court erred by imposing a life sentence with no possibility of parole for thirty years instead of a life sentence with no possibility of parole for twenty years. The Ohio Court of Appeals for the Tenth District affirmed the sentence. *Ohio v. Carpenter*, 1991 WL 35009 (Mar. 12, 1991). Appellate counsel did not seek discretionary review in the Supreme Court of Ohio. Upon ending his representation, appellate counsel did not advise Carpenter that he could challenge his appellate counsel's effectiveness. Carpenter's Application for Reopening, p. 1 (Appendix A-9).

On March 13, 1992, Carpenter pursued state post-conviction relief pro se pursuant to Ohio Rev. Code Ann. § 2953.21[2] (Anderson 1999), and he requested a copy of his trial transcript. The trial court held that Carpenter had no right to his transcript and dismissed the post-

[2] Ohio's post-conviction statute was amended in 1996, but those amendments are not relevant here.

conviction petition. Carpenter appealed pro se to the Ohio Court of Appeals for the Tenth District. After briefing, the court appointed post-conviction counsel. Ultimately, the Ohio Court of Appeals for the Tenth District denied Carpenter's appeal and his request for a copy of his transcript. *Ohio v. Carpenter*, 1992 WL 361815 (Dec. 3, 1992). On April 14, 1993, the Supreme Court of Ohio declined jurisdiction. *Ohio v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

Represented by new retained counsel, Carpenter finally secured a copy of his trial transcript giving him his first opportunity to evaluate the quality of his trial and direct appeal attorneys. On July 15, 1994, Carpenter challenged the effectiveness of his direct appeal counsel for failing to argue that his guilty plea was illegally obtained because no evidence was presented to support the charges in the indictment. Carpenter pursued this claim pursuant to Ohio R. App. P. 26(B). Carpenter asserted that "good cause" existed for consideration of his Application to Reopen because his previous appellate counsel did not meet with him during his appeal, did not allow him to review or assist in preparation of the brief, and did not inform him how to challenge the effectiveness of his appellate attorney. Carpenter's Application for Reopening, pp. 1, 11 (Appendix A-9-A-11). The State opposed the application. The Ohio Court of Appeals for the Tenth District summarily concluded that Carpenter did not demonstrate "good cause" for not filing his application within ninety days of the court of appeal's decision affirming his conviction and sentence. J.A. 19-20.

Carpenter then requested the Supreme Court of Ohio to exercise its discretionary jurisdiction to consider his

appeal. After merit briefing by Carpenter and the State, the Supreme Court of Ohio affirmed the Ohio court of appeals. J.A. 21-22.

On May 3, 1996, Carpenter filed a habeas corpus petition in the United States District Court for the Southern District of Ohio. He alleged: 1) his guilty plea was illegally obtained because the state presented no evidence in support of the indictment; 2) ineffective assistance of appellate counsel for failing to challenge the illegal plea; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state courts through the application of Ohio R. App. P. 26(B). J.A. 28-29.

In his return of writ, the Warden conceded that Carpenter exhausted all of his claims but asserted that Carpenter procedurally defaulted them. Return of Writ, pp. 7-8. In addressing the merits of Carpenter's claims, the Warden did not refute the illegality of Carpenter's plea. Rather, he argued that there was overwhelming "evidence" of Carpenter's guilt even though absolutely no evidence of the crime was ever presented. Return of Writ, p. 10. He made cursory arguments in response to Carpenter's other two claims. Return of Writ, pp. 11-12.

Carpenter filed a traverse in which he argued, among other things, that his claim of ineffective appellate counsel could not be defaulted because Ohio R. App. P. 26(B) was not an adequate and independent rule. Traverse, pp. 16-20. In the alternative, he argued that if his claims were in fact procedurally defaulted, he could establish cause and prejudice for their default. Traverse, p. 21. The Warden did not respond to Carpenter's cause and prejudice arguments.

The district court determined that Carpenter's illegal-plea claim was procedurally defaulted; thus, it went on to consider the federal, procedural question whether the default of the illegal-plea claim could be excused. J.A. 40. Because Carpenter asserted appellate ineffectiveness as the cause for the default of his merit claim, the district court held that it needed to determine if the ineffectiveness claim was preserved for federal review. J.A. 41.

In order to determine if Carpenter's ineffectiveness claim was defaulted, the district court first considered whether Ohio had an independent and adequate state rule upon which the default could be premised. The district court concluded that Rule 26(B) was not adequate because it was not consistently applied and regularly followed. J.A. 42. Therefore, it held that Carpenter's ineffectiveness claim was not procedurally defaulted. J.A. 44.

The district court then considered the merits of the ineffectiveness claim as cause for the default of the plea claim. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the district court determined that Carpenter had, in fact, been denied the effective assistance of appellate counsel. J.A. 49. Carpenter was also prejudiced because his guilty plea was illegally obtained. J.A. 49. Therefore, Carpenter demonstrated cause and prejudice for the default of his illegal-plea claim. Rather than grant relief because Carpenter's guilty plea was illegally obtained, the district court issued a conditional writ directing the State to reinstate Carpenter's direct appeal. J.A. 50.

The Warden appealed to the Sixth Circuit. The sole issue raised by the Warden was: "Did the district court

erroneously conclude that Carpenter's ineffective assistance of appellate counsel claim is not barred by procedural default?" Final Brief of Respondent-Appellant, p. viii. Further, the Warden conceded that the constitutional error found by the district court was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Final Brief of Respondent-Appellant, p. iii (Appendix A-14-A-15).

Carpenter cross-appealed. Relying on *Murray v. Carrier*, 477 U.S. 478 (1986), he argued that a habeas petitioner need only exhaust cause and prejudice arguments before they may be considered. Although the Warden filed an opposing brief, it was unresponsive to Carpenter's cross appeal; the Warden argued only that Rule 26(B) was adequate and independent.

The Sixth Circuit found that a habeas petitioner need only exhaust cause and prejudice requirements; therefore, it did not consider the Warden's position that Rule 26(B) was an adequate and independent rule. In dicta, however, the Circuit noted that Rule 26(B) was likely inadequate. J.A. 65 n. 13.

Finding that Carpenter properly exhausted his ineffectiveness claim, the Sixth Circuit proceeded to the *Strickland* analysis. J.A. 62. The court held that Carpenter was denied the effective assistance of appellate counsel because his attorney did not challenge the illegality of his plea. J.A. 64 ("[I]t is unfathomable why Carpenter's counsel failed to raise a sufficiency of the evidence claim on appeal.")

The Sixth Circuit affirmed the district court's grant of a conditional writ but ordered a new trial as opposed to a new appeal because Carpenter's guilty plea was obtained

in violation of the Due Process Clause of the Fourteenth Amendment. J.A. 66. While recognizing the merits of the claim, the Sixth Circuit noted that the appropriate remedy was premised upon the resolution of a factual issue, whether Carpenter stipulated to the prosecutor's statement of facts.[3] J.A. 64 n. 11. Upon remand, both the Warden and Carpenter agreed that the sole remaining issue for resolution by the district court was the nature of the remedy to be given Carpenter. *See* Respondent Mohr's Response to Petitioner's Motion to Receive Legal Memoranda From the Parties, p. 2; Carpenter's Responsive Memorandum to the Magistrate Judge's May 18, 1999 Order, pp. 2-3.

The Warden requested rehearing *en banc*. Because no Circuit Judge of the Sixth Circuit requested a vote, the original panel considered and denied the Warden's request for rehearing. J.A. 67. The mandate issued and has not been recalled.

The Warden filed a petition for writ of certiorari to this Court on June 22, 1999. On November 8, 1999, this Court granted the Warden's petition for writ of certiorari and granted Carpenter's motion to proceed in forma pauperis. On December 13, 1999, this Court appointed undersigned counsel. On December 23, 1999, the Warden filed his merit brief. Carpenter now respectfully submits his merit brief in response.

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[3] This was error. The Warden did not appeal the finding by the district court that Carpenter did not stipulate or adopt the prosecutor's statement of facts. J.A. 48-49.

SUMMARY OF ARGUMENT

No federal court has found Carpenter's appellate-ineffectiveness claim to be procedurally defaulted. Despite that fact, the Warden asks this Court to determine if procedurally defaulted ineffective-assistance-of-counsel claims may be asserted as cause for the default of a merits claim. Questions of cause and prejudice, however, are not relevant until a federal court determines that the state procedural rule relied upon for the default is adequate and independent. *See Coleman v. Thompson*, 501 U.S. 722 (1991).

The district court held that Ohio R. App. P. 26(B), the rule that lies at the very heart of the Warden's procedural default argument, is inadequate because it is inconsistently applied. Thus, it determined that Carpenter's ineffective-assistance-of-counsel claim is not procedurally defaulted. The Sixth Circuit did not disturb the district court's ruling.

Because no federal court has found that Carpenter's appellate-ineffectiveness claim is procedurally defaulted, the Warden's question is hypothetical. For this reason, the issue briefed by the Warden is not presented with the concreteness required to support constitutional adjudication and, therefore, certiorari should be dismissed as improvidently granted.

If this Court does reach the merits of this case, principles of comity do not require extending the procedural default doctrine to claims asserted as cause. The exacting standard for ineffective-assistance-of-counsel claims combined with the exhaustion requirement of *Murray v. Carrier*, 477 U.S. 478 (1986), ensures that state courts have the

first opportunity to hear such claims and that federal courts retain the ability to remedy federal constitutional violations. The Warden has not identified a state interest that justifies an extension of the procedural default doctrine to cause arguments.

Contrary to the Warden's assertion, this Court did not extend the procedural default analysis to claims asserted as cause in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). *LaGrand* is not dispositive of the question presented here because it is a per curiam decision predicated on a habeas petitioner's outright waiver of his claims. *LaGrand* was decided on the basis of waiver, not procedural default. While *LaGrand* does not resolve the issue before this Court, the answer can be ascertained by a survey of this Court's habeas corpus jurisprudence.

This Court has always treated habeas merit claims and reasons advanced as cause for the default of those claims differently. Habeas claims are divided into two categories: merit claims and gateway claims. *See Herrera v. Collins*, 506 U.S. 390 (1993); *Schlup v. Delo*, 513 U.S. 298 (1995). Merit claims are those claims that, if resolved in a petitioner's favor, authorize a federal court to issue a writ of habeas corpus. Resolution of gateway claims in a petitioner's favor, on the other hand, merely authorizes a federal court to consider otherwise procedurally defaulted merit claims. In both *Herrera* and *Schlup*, this Court considered procedurally defaulted gateway claims.

Historically, this Court has only applied the procedural default doctrine to merit claims. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Connor, J., dissenting) (noting that *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); *Reed v. Ross*, 468 U.S. 1 (1984); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); and *McClesky v. Zant*, 499 U.S. 467 (1991) concerned whether federal courts could consider the merits of a claim). When a habeas petitioner proves a gateway claim, such as ineffective-assistance-of-counsel, he does not win his case. Even after meeting the rigorous standard for ineffectiveness claims, all he achieves is the right to have his otherwise defaulted merit claim reviewed by a federal court. Thus, this Court's well-established principle of applying the procedural default doctrine to merit claims protects a state's interest in the finality of its criminal verdicts without curtailing federal review of constitutional violations.

Engrafting an additional procedural default requirement to cause arguments will cost more money and further delay the resolution of habeas corpus cases. The very point of *Carrier* was to make the job of habeas courts manageable by giving them the familiar, yet very demanding, *Strickland v. Washington*, 466 U.S. 668 (1984), standard to apply. *Carrier*, 477 U.S. at 488-489. Because *Strickland* is so rigorous, it also guarantees that there will not be a flood of overturned state cases. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

This *is* a case about federalism, but not for the reasons asserted by the Warden. This is a case about federalism because it asks if Article III Courts should retain their ability to determine whether merit claims should be reviewed or whether that responsibility should be abdicated to the states. The Warden is only interested in precluding federal courts from acting at all.

Federal courts should retain their ability to evaluate state procedural rules and to determine when claims should be reviewed on their merits. Only by doing so, will the federal courts retain the power to remedy federal constitutional violations in those rare cases, like this one, that are deserving of the writ of habeas corpus.

ARGUMENT

I

THE QUESTION PRESENTED BY THE WARDEN IS NOT SUPPORTED BY THE RECORD IN THIS CASE.

No federal court has ruled that Carpenter's appellate-ineffectiveness claim is procedurally defaulted. The Warden conceded that point. Warden's Merit Brief, pp. 8-9; *see also* Warden's Certiorari Petition, pp. 8-9 n. 2 ("remand would be appropriate to allow the court of appeals to consider" the adequacy of the rule). By doing so, he also conceded that the question presented is not ripe for review.

Wainwright v. Sykes, 433 U.S. 72 (1977), requires a finding of procedural default before a habeas petitioner need present cause and prejudice arguments. Under *Sykes*, the interests of comity and federalism require that a federal court respect the "adequate and independent state ground" upon which a state court relied in rejecting a federal claim. *Id.* at 78-79. A procedural default occurs only if the state proves the default by asserting it in a timely manner, by establishing that the state actually has an "adequate" and "independent" procedural rule the prisoner violated, and by demonstrating that the state

courts actually relied upon the rule to deny the petitioner relief. *James v. Kentucky*, 466 U.S. 341, 348-351 (1984). Only then does a federal court consider whether a petitioner can prove cause and prejudice for the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Consistent with this Court's ordered scheme, "considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court." *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980). The federal court best positioned to decide the cognizability of a procedural default is the court within the state's jurisdiction. *Id.* This Court has repeatedly recognized that "courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n. 7 (1980)); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-154 (1979); *see also Terrell v. Morris*, 493 U.S. 1, 3 n. 1 (1989) ("since the answer to the question requires a familiarity with Ohio law, it should not be addressed in this Court before we have the benefit of the Court of Appeals' views").

The district court held that Rule 26(B) did not constitute an adequate and independent state ground upon which Carpenter's appellate-ineffectiveness claim could be defaulted. J.A. 42. The Sixth Circuit agreed, in dicta, that the state procedural ground was likely inadequate. J.A. 65 n. 13. Because no federal court has determined that Carpenter's ineffectiveness claim is procedurally defaulted, he need not offer any cause arguments. Thus, it is irrelevant as a matter of fact and law whether a

habeas petitioner can procedurally default his cause arguments. Simply put, the issue upon which this Court granted certiorari does not exist in this case.

Article III of the Constitution defines and limits the power of the Judiciary in terms of specified cases and controversies. Because this Court is an Article III Court, the exercise of its jurisdiction is circumscribed by the various elements of what is commonly referred to as "justiciability." For purposes of justiciability, a case before this Court must involve a controversy that is "definite and concrete, touching the legal relationships of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). This Court does not engage in academic exercises concerning hypothetical issues. *See e.g. Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) (jurisdiction "should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form' "); *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) (certiorari dismissed, Article III requires an actual dispute between the parties).

In this Court's plenary review, facts may be discovered via briefing or argument that indicate that the grant of certiorari was improvident. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *see e.g. Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (certiorari dismissed as improvident when "it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us."); *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) (certiorari dismissed as improvident, because "artificial and hypothetical issue"

requested "an advisory opinion"); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (deciding case requires resolution of hypothetical question; writ dismissed as improvidently granted).

This case is predicated on an antecedent issue to the question on which certiorari was granted – whether Carpenter defaulted his ineffectiveness claim. Both parties agree that no federal court has found Carpenter's ineffectiveness claim to be procedurally defaulted. *See* Warden's Merit Brief, pp. 8-9; Warden's Certiorari Petition, p. 9 n. 2. Because a cognizable procedural default is a necessary predicate for the onset of cause and prejudice considerations, this omission renders the Warden's certiorari question purely hypothetical. It would be inappropriate to leap-frog over the antecedent procedural default question in order to reach the contingent cause question that the Warden urges this Court to resolve. To do so would be premature and advisory. Consequently, Carpenter respectfully requests this Court to dismiss the writ of certiorari.

II

CARPENTER'S ILLEGAL-PLEA CLAIM HAS MERIT, AND THE DISTRICT COURT HELD THAT OHIO APPELLATE RULE 26(B) CANNOT EFFECTUATE A FEDERAL DEFAULT OF CARPENTER'S APPELLATE-INEFFECTIVENESS CLAIM.

Two claims lie at the core of this case: Carpenter's claim that his guilty plea was illegally obtained and his claim that he was denied the effective assistance of appellate counsel. The Warden does not accurately explain those claims or the legal standards by which they are

judged. Assuming that the question presented is properly before this Court, it cannot be addressed without a full and correct understanding of those underlying issues. Therefore, in order to correct the errors made by the Warden, Carpenter submits the following introductory argument.

A. CARPENTER'S ILLEGAL-PLEA CLAIM HAS MERIT, AND THE WARDEN HAS NEVER CHALLENGED THE MERITS OF THAT CLAIM.

The Warden asserts that he does not understand the nature of Carpenter's illegal-plea claim and that the claim has not been addressed in the courts below. Warden's Merit Brief, p. 6 n. 4. The Warden's professed confusion aside, both lower courts squarely addressed the issue, J.A. 47-48, 62-63, and the Sixth Circuit specifically determined that Carpenter's illegal-plea claim had merit. J.A. 66.

The basis of Carpenter's illegal-plea claim is that the prosecution did not introduce any evidence in support of the charges in the indictment. When a defendant claims his factual innocence while pleading guilty, state courts are constitutionally required to establish a basis for the guilty plea. *See North Carolina v. Alford*, 400 U.S. 25, 37-39 (1970). Without presentation of evidence that establishes a factual basis for the crimes charged, a trial court may not accept a guilty plea to a capital offense. *Id.*

The only support offered for the charges against Carpenter was the statement of the prosecutor. The trial court accepted Carpenter's guilty plea based solely on

the prosecution's version of facts. Carpenter refused to stipulate to those facts. Tr. 15-17; J.A. 48-49. The trial court accepted the plea despite the fact that, in Ohio, "a three-judge panel is required to examine witnesses and to hear any other evidence properly presented by the prosecution in order to make a Crim. R. 11 determination as to the guilt of the defendant." *Ohio v. Green*, 81 Ohio St. 3d 100, 689 N.E.2d 556, syl. (1998); *Ohio v. Post*, 32 Ohio St. 3d 380, 393, 513 N.E.2d 754, 766 (1987); Ohio R. Crim. P. 11; Ohio Rev. Code Ann. § 2945.06 (Anderson 1999); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Evitts v. Lucey*, 469 U.S. 387 (1985).

When a defendant pleads to a capital indictment, the trial court is required to examine witnesses to determine if the defendant is guilty of aggravated murder or of a lesser crime. *Green*, 81 Ohio St. 3d at 103, 698 N.E.2d at 559; *Post*, 32 Ohio St. 3d at 393, 513 N.E.2d at 766. Failure to do so renders any resulting conviction void. *Id.*

The Warden suggests that the rule was first articulated by the Supreme Court of Ohio in 1998 when it decided *Green*. Warden's Merit Brief, p. 10. Long before Carpenter's culpability hearing, however, Ohio and Federal law required a factual basis for charges in an indictment before a defendant, who maintains his innocence, may plead guilty to a capital offense. *See Post*, 32 Ohio St. 3d at 393, 513 N.E.2d at 766; *Ohio v. Taylor*, 30 Ohio App. 2d 252, 285 N.E.2d 89 (1972); *Alford*, 400 U.S. at 37-39. In fact, Ohio recognized that there must be some proof that a crime occurred beyond a prosecutor's statement since at least 1949 when the Supreme Court of Ohio held that a prosecutor's statement was not evidence. *See Maggio v. Cleveland*, 151 Ohio St. 136, 84 N.E.2d 912

(1949). *Green* merely incorporated the rule into the Supreme Court of Ohio's syllabus law.

The district court held that because the prosecution did not offer any evidence to support the charges in the indictment, the trial court accepted Carpenter's guilty plea in violation of federal law. J.A. 49. It also held that Carpenter was denied the effective assistance of appellate counsel because the error was not raised on direct appeal. J.A. 49. The Sixth Circuit agreed, holding that Carpenter's guilty plea was obtained in violation of the Due Process Clause of the Fourteenth Amendment, J.A. 62, and that Carpenter's appellate counsel was ineffective for failing to raise such an obvious error on direct appeal. J.A. 63.

Despite the Sixth Circuit's specific holding that it was constitutional error to accept Carpenter's plea without a factual basis, the Warden argues that the merits of the claim have never been addressed. Warden's Merit Brief, p. 6 n. 4. The opinions of both lower courts demonstrate otherwise; both held that Carpenter's illegal plea claim has merit, and both courts held that Carpenter was denied the effective assistance of appellate counsel because the error was not raised on direct appeal. J.A. 49, 64.

B. OHIO'S PROCESS FOR REVIEWING CLAIMS OF APPELLATE INEFFECTIVENESS WAS NOT SETTLED UNTIL 1996.

The Warden asserts that Ohio's process for addressing claims of appellate ineffectiveness was firmly established in 1993, and he suggests that Rule 26(B)'s ninety-

day time limit is jurisdictional. Neither assertion is accurate.

Prior to 1992, the process for reviewing appellate-ineffectiveness claims was unsettled in Ohio. *See Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990); *Ohio v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). In *Murnahan*, the Supreme Court of Ohio harmonized the various procedures used to address claims of appellate ineffectiveness and held that appellate-ineffectiveness claims could not be raised in post-conviction proceedings. *Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204, syl. 1 and 2 (1992). To pursue them, a prisoner would have to file an "application for delayed reconsideration" in the Ohio appellate courts. *Id.* at 66, 584 N.E.2d at 1209.

In the wake of *Murnahan*, the Supreme Court of Ohio crafted Appellate Rule 26(B). The rule requires claims of appellate ineffectiveness to be filed within ninety days of the original court of appeals decision affirming a conviction. If an applicant cannot file within ninety days, he has to provide an explanation amounting to "good cause" for the delay.

The Warden asserts that Ohio's process for addressing appellate-ineffectiveness claims was "firmly established" when Rule 26(B) went into effect on July 1, 1993. Warden's Merit Brief, pp. 5-7. But there is more to the story.

At the time Rule 26(B) was adopted, the Supreme Court of Ohio had another rule in place that divested the Ohio courts of appeals of jurisdiction to consider any action once a notice of appeal was filed in the Supreme

Court of Ohio or when the time for filing an appeal expired. Former S. Ct. Prac. R. II(2)(D)(1):

> After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to *rule on an application for reconsideration* filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(Emphasis added) (Appendix A-4). For nearly three years after Rule 26(B) was adopted, Ohio appellate courts were without jurisdiction to consider Rule 26(B) applications because of former S. Ct. Prac. R. II(2)(D)(1). *See, e.g., Ohio v. Howe*, 73 Ohio St. 3d 35, 652 N.E.2d 193 (1995); *Ohio v. Wogenstahl*, 75 Ohio St. 3d 273, 662 N.E.2d 16 (1996).

In early 1996, the Supreme Court of Ohio expressly held that former S. Ct. Prac. R. II(2)(D)(1) divested the courts of appeals of jurisdiction to entertain Rule 26(B) applications. *Wogenstahl*, 75 Ohio St. 3d at 275, 662 N.E.2d at 17. Because former S. Ct. Prac. R. II(2)(D)(1) specified that the courts of appeals retained jurisdiction only to rule on applications for reconsideration (App. R. 26(A)) as opposed to applications to reopen (App. R. 26(B)), the supreme court held that jurisdiction of the court of appeals was not retained to rule upon an application for reopening under App. R. 26(B). *Wogenstahl*, 75 Ohio St. 3d at 275, 662 N.E.2d at 17.

Wogenstahl was short-lived. Twenty-six days after it was decided, on April 1, 1996, the Supreme Court of Ohio finally corrected the obvious conflict between Rule 26(B)

and former S. Ct. Prac. R. II(2)(D)(1). It adopted the following amendment to S. Ct. Prac. R. II(2)(D)(1):

> After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(Appendix A-5.) The distinction between Rule 26(A) and (B) was eliminated. To dispel any confusion, the court clarified the significance of the amendment in the accompanying staff notes: "This amendment provides that a court of appeals retains jurisdiction to rule on *either* an application for reconsideration or an application for reopening filed pursuant to App. R. 26." (Emphasis added.)

Although the state relied upon the jurisdictional defect in the rule in response to Carpenter's application to reopen, Memorandum in Opposition to Carpenter's Application to Reopen, pp. 4-5 (Appendix A-12-A-13), the Warden now asserts that Carpenter did not file his Rule 26(B) application until more than a year after Rule 26(B) "firmly established" the procedure for pursuing claims of appellate ineffectiveness. Warden's Merit Brief, pp. 5-7. But as the history of Rule 26(B) demonstrates, Ohio's procedure for addressing claims of appellate ineffectiveness was not settled until April 1, 1996 – almost two years after Carpenter filed his application to reopen in the court of appeals on July 15, 1994.

The Warden also suggests that a habeas petitioner can intentionally bypass Rule 26(B) and deprive Ohio of ever reviewing a claim of appellate ineffectiveness. In other words, the Warden suggests that Carpenter had to file his application within ninety days or not at all. Warden's Merit Brief, p. 26. But the very text of Rule 26(B) refutes the Warden's position: "An application for reopening shall be filed in the court of appeals within ninety days from journalization of the appellate judgment *unless the applicant shows good cause for filing at a later time.*" Ohio R. App. P. 26(B)(1) (emphasis added).

Contrary to the underlying facts of *Coleman v. Thompson*, 501 U.S. 722 (1991), upon which the Warden relies, an Ohio appellate court always has the discretion to consider the merits of a Rule 26(B) application. If a prisoner files his application more than ninety days after the court of appeals decision, he must show good cause for the delay. The good cause provision of Rule 26(B), however, has not been consistently applied by the Ohio appellate courts. J.A. 43.

The district court addressed the inadequacy of Rule 26(B) holding that the Ohio courts of appeals have not consistently applied the "good cause" provision. J.A. 42. The district court also held that the Supreme Court of Ohio has offered little guidance on the meaning of the rule. J.A. 43. As a consequence, the district court held that because Rule 26(B) is not firmly established and regularly followed, Carpenter's appellate-ineffectiveness claim could not be procedurally defaulted. J.A. 44.

The fact that the district court held that Carpenter's ineffectiveness claim was not procedurally defaulted

seems to be lost on the Warden. Several times in his merit brief, he argues that Carpenter's ineffectiveness claim is procedurally defaulted because Carpenter "missed the State's deadline for raising an ineffective-assistance claim."[4] Warden's Merit Brief, pp. 27, 28, and 29. Yet, the Warden acknowledges that the district court held that "Carpenter's procedural default in raising his ineffectiveness claim did not pose an adequate state ground barring federal-court review the claim." Warden's Merit Brief, pp. 8-9.

The Sixth Circuit did not address the adequacy of Rule 26(B) but stated that it likely agreed with the district court that the "good cause" provision of Rule 26(B) has been inconsistently applied. J.A. 65 n. 13. A federal court must first determine if a state rule is firmly established and regularly applied before it can find that a habeas claim is procedurally defaulted. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The Warden acknowledges that the Sixth Circuit did not engage in that necessary step, Warden's Merit Brief, p. 9 n. 7, but somehow reasons that Carpenter's ineffectiveness claim is procedurally defaulted anyway.

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[4] This may also explain why the Warden's *Amici* mistakenly presume, without citing to any holding below, that Carpenter's ineffectiveness claim is procedurally defaulted. The Warden's *Amici* argue that "[b]ecause the court of appeals has effectively ruled that procedurally defaulted ineffective assistance of counsel claims will be resurrected in federal court to serve as "cause" for other procedurally defaulted claims, a petitioner can knowingly choose to default claims in the state court in hopes that a federal court will accord more favorable review of his federal claims." *Amici* Brief, p. i.

It is true that a litigant commits a procedural default if a state court so holds and that a prisoner may forfeit later state-court opportunities to litigate claims because of that default. However, procedural defaults and resulting forfeiture sanctions do not constitute grounds that are adequate, as a matter of federal law, to bar habeas review unless a federal court determines that the state procedural rule is adequate, independent, firmly established and consistently applied. *See James v. Kentucky*, 466 U.S. 341, 348-351 (1984). The district court squarely held that Rule 26(B) does not meet these criteria, J.A. 44, and the Sixth Circuit did not disturb that ruling.

One thing in this case is certain. No federal court has found that Rule 26(B) is an adequate and independent state rule that is firmly established and regularly followed. Without such an explicit finding, Carpenter's ineffectiveness claim simply cannot be procedurally defaulted.

III

THE PROCEDURAL DEFAULT DOCTRINE DOES NOT APPLY TO REASONS ADVANCED AS CAUSE FOR THE DEFAULT OF OTHER CLAIMS IN HABEAS CORPUS PROCEEDINGS.

The Warden invites this Court to apply the procedural default doctrine to reasons that are asserted as cause for the default of a habeas claim. He does so without articulating any state interest that justifies an extension of *Wainwright v. Sykes*, 433 U.S. 72 (1977), to cause arguments or by explaining why existing state interests are not already adequately protected. Assuming

that the question is properly before this Court, Carpenter urges this Court to decline the Warden's invitation.

In this section, Carpenter explains why there is no state interest that justifies applying the procedural default doctrine to reasons advanced as the cause for a habeas claim's procedural default. First, Carpenter explains that *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999), is not dispositive of the question presented here. Second, Carpenter explains that habeas claims and the reasons offered to excuse their default are entirely different creatures which deserve different treatment and have always been treated differently by this Court. Finally, Carpenter asserts that whether there has been a cognizable procedural default of a habeas claim is purely a question of federal, procedural law.

A. CONTRARY TO THE WARDEN'S ERRONEOUS ASSERTION, *STEWART V. LEGRAND*, 119 S. Ct. 1018 (1999) (PER CURIAM), DID NOT RESOLVE THE QUESTION PRESENTED TO THIS COURT.

The Warden relies heavily on dicta from this Court's per curiam opinion in *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999). *LaGrand*, however, is not dispositive of the question presented here because it is a per curiam opinion predicated on a habeas petitioner's outright waiver of his claims.

LaGrand was issued without full briefing or oral argument and, thus, offers little precedential value. Typically, this Court does not seek guidance from opinions that are issued without the benefit of full briefing and

oral argument. *Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) ("For example, we have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument") (citing *Gray v. Mississippi*, 481 U.S. 648, 651, n.1 (1987)); *United States v. Dixon*, 509 U.S. 688, 716 (1993) ("A summary reversal, like *Harris*, 'does not enjoy the full precedential value of a case argued on the merits.' Today's decision shows the pitfalls inherent in reading too much into a 'terse *per curiam*.' ") (Rehnquist, C. J., concurring in part and dissenting in part) (citations omitted).

In addition to the fact that *LaGrand* lacks authoritative value, it is also distinguishable from Carpenter's case. Unlike Carpenter, LaGrand specifically waived *both* his underlying merit claim (that lethal gas is unconstitutional) and his cause argument that he was denied the ineffective assistance of counsel. LeGrand was precluded from challenging his means of execution because he declared, and later reaffirmed, that he desired to be executed by lethal gas. *LaGrand*, 119 S. Ct. at 1020. As a result, this Court determined that *Teague v. Lane*, 489 U.S. 288 (1989), operated to preclude the resurrection of a habeas claim that was expressly waived. *LaGrand*, 119 S. Ct. at 1020.

LaGrand also conceded at the district court level that his ineffective-assistance-of-counsel claim lacked merit. *Id.* at 1021. Therefore, he could not later assert it as cause for the default of another habeas claim. It was LaGrand's knowing and voluntary waiver of his claims which prompted this Court to grant Arizona's application to vacate the Ninth Circuit's order restraining Arizona from executing LaGrand by lethal gas. *Id.* at 1021 ("Walter

LaGrand entered a waiver of any potential claims of ineffective assistance of counsel and Burke [LaGrand's attorney] indicated to the Court that he believes that no such grounds exist. *LaGrand v. Lewis*, 883 F. Supp. 451, 456 n.3 (1995)"). *LaGrand* was decided on the basis of waiver, not because LaGrand's ineffectiveness claim was procedurally defaulted.

The partially quoted sentence that the Warden exclusively relies upon is actually an alternative and unexplained finding within the per curiam opinion and lacks the force of an adjudication. The unedited passage that the Warden cites reads in its entirety:

> Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause, also fails. Walter LaGrand specifically waived the claim that his trial counsel was ineffective, representing to the District Court prior to filing his first federal habeas petition that there was no basis for such claims. *See LeGrand v. Lewis, supra*, at 456 n.3; *LaGrand v. Stewart, supra*, at 1269. In addition, the ineffective assistance of counsel claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to a state procedural rule, *see State v. LaGrand*, No. CR-07426, Minute Entry (Pima County Super. Ct. March 2, 1999), and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review."

LaGrand, 119 S. Ct. at 1021.

While *LaGrand* does not resolve the issue before this Court, the answer can be found woven throughout this

Court's habeas corpus jurisprudence. This Court has always treated habeas claims and reasons advanced as cause for the default of those claims differently. This difference in treatment is the basis of Carpenter's argument that the procedural default doctrine does not apply to his cause argument.

B. THIS COURT HAS ALWAYS TREATED "MERIT" CLAIMS AND "GATEWAY" CLAIMS DIFFERENTLY, AND IT SHOULD CONTINUE TO DO SO.

There are two types of claims advanced in federal habeas corpus proceedings. "Merit" claims are those claims upon which a federal court may grant relief. "Gateway" claims are those claims which are used to explain why otherwise procedurally barred constitutional claims should be considered on the merits. The Warden recognizes that cause arguments serve a "gate-keeping" function. Warden's Merit Brief, p. 18. The Warden fails, however, to distinguish between the distinct purposes of gateway and merit claims or between the relevant state interests they implicate.

The procedural default doctrine is not applicable to gateway claims for two reasons. First, a federal court may not grant relief from a state court judgment based purely upon a gateway claim; the favorable resolution of a gateway claim merely permits a federal court to consider an otherwise defaulted merit claim. Thus, a state's interest in finality is not compelling at the gate-keeping stage because the petitioner is merely seeking authorization from the court to apply for the writ. Second, the question

of procedural default is a purely federal inquiry. Federal courts decide which merit claims should be reviewed. And while a state's disposition of a case on procedural grounds is a relevant consideration with respect to merit claims, a state may not preemptively determine the scope of a federal court's discretion. Consequently, for purposes of gateway claims alone, exhaustion is enough.

1. In *Herrera v. Collins*, 506 U.S. 390 (1993), and *Schlup v. Delo*, 513 U.S. 298 (1995), this Court defined the difference between merit claims and gateway claims.

Two decisions from this Court explain that gateway claims and merit claims are functionally different. While not squarely presented with the issue posed here, *Herrera v. Collins*, 506 U.S. 390 (1993); and *Schlup v. Delo*, 513 U.S. 298 (1995), explain that merit claims and gateway claims serve distinct purposes.

In *Herrera*, the habeas petitioner alleged that he was actually innocent of the crime for which he was convicted and sentenced to death, but he did not allege a constitutional, trial error. Without an accompanying constitutional claim, a plurality of this Court held, his claim of actual innocence was irrelevant. "A claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to

have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.[5]

Herrera's claim of actual innocence was of no import because Herrera did not seek excusal of a procedural error so that he might bring an independent constitutional claim challenging his conviction or sentence. *Id.* The gateway claim of actual innocence would only be relevant if "the prisoner *supplements* his constitutional claim with a colorable showing of actual innocence." *Id.* at 404 (emphasis in original) citing *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986). In other words, had Herrera presented a separate merit claim – one amounting to a denial of a federal constitutional right – Herrera could have asserted actual innocence as his gateway claim to excuse the default of his merit claim.

It was of no consequence to this Court that Texas refused to entertain Herrera's newly discovered evidence of actual innocence. *Herrera*, 506 U.S. at 411. "A petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* at 404. Carpenter asserts that because the gateway claim could not, itself, disturb the finality of Herrera's conviction, this Court did not apply the procedural default doctrine.

Herrera failed because he could not articulate a federal, constitutional claim requiring exercise of the Great

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[5] While *Herrera* was a plurality opinion, all nine Justices of this Court agreed that Herrera's actual innocence claim could serve as a gateway to another constitutional claim.

Writ; he attempted to open a gateway to nowhere. But the petitioner in *Schlup v. Delo*, 513 U.S. 298 (1995), did it right.

Schlup filed a second federal habeas corpus petition asserting that he was actually innocent and that he was denied the effective assistance of trial counsel. Schlup's ineffectiveness claim was procedurally defaulted; nevertheless, this Court remanded his case for further proceedings to determine if he could demonstrate sufficient evidence of his actual innocence so that the procedural default of his ineffectiveness claim could be excused. *Schlup*, 513 U.S. at 332.

In doing so, this Court again noted the fundamental distinction between gateway claims and merit claims. Gateway claims, this Court held, are procedural rather than substantive. 513 U.S. at 314. Because no relief can be granted on claims that are purely procedural, a state has no interest in blocking a federal court's review of that claim; therefore, the federal courts were not restrained by the fact that much of Schlup's evidence of actual innocence was presented for the first time in a successor habeas petition. *Id.* Rather, this Court characterized Schlup's case as resting, in the final analysis, on his underlying merit claim, which could only be addressed if Schlup proved his gateway claim. *Id.* at 316.

While *Herrera* and *Schlup* both dealt with the fundamental-miscarriage-of-justice exception to procedural default, both cases teach that all claims advanced in federal habeas proceedings and, indeed, all arguments advanced in support of them, need not be constrained by the doctrines of exhaustion and procedural default. *See*

Vasquez v. Hillery, 474 U.S. 254, 257-58 (1986) ("We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts"). Federal courts unquestionably owe a great degree of respect to state-court judgments, but not at the expense of an Article III Court's discretion to determine, in the first instance, if merit claims should be reviewed. *See Reed v. Ross*, 468 U.S. 1, 15 (1984) ("This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254"). Comity requires more than protecting the states' interests; those interests must be weighed against the federal courts' authority to remedy fundamental wrongs committed by the states.

2. The Exhaustion and Procedural Default Doctrines serve distinct purposes.

While federal courts must respect a state-court conviction, the state courts must also respect the federal judiciary's role in determining when claims are properly reviewable in habeas corpus proceedings. Accepting the Warden's position, federal courts will be precluded from considering meritorious constitutional claims once a state – rightly or wrongly – has foreclosed consideration of an argument upon which a petitioner does not seek federal relief. In short, the Warden is attempting to co-mingle the doctrines of exhaustion and procedural default when this Court has held that the doctrines accomplish different

goals. *See O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732 (1999).

The exhaustion doctrine serves two, simple goals. The exhaustion doctrine exists to give state courts the first opportunity to rule on the constitutionality of its own cases. *See Ex Parte Royall*, 117 U.S. 241 (1886); *Boerckel*, 119 S. Ct. at 1732. It also exists to encourage state courts to be the primary guarantor of prisoner's federal, constitutional rights. *Id.*

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. *Boerckel*, 119 S. Ct. at 1732. State prisoners, therefore, meet the exhaustion requirement by presenting their constitutional claims through one complete round of the State's established appellate review process. *Id.* Once a prisoner fulfills that obligation, the relevance of the underlying comity concern behind the exhaustion doctrine ends.

The problem of procedural default is separate from the question whether a state prisoner has exhausted state remedies. *Engle v. Isaac*, 456 U.S. 107, 125-126 n. 28 (1982). The procedural default doctrine is concerned with the finality of a state decision. If a prisoner does not comply with a state's procedural rules[6] so as to deprive the state of its ability to address a federal constitutional, merit

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[6] This assumes that a state's procedural rules are fair and adequate. If they are not, a state has no legitimate interest in the finality of its decision not to reach the merits of a federal, constitutional claim.

claim, then a federal court should not reach that claim and upset the state verdict.

States have a right to rely upon their own procedural framework for deciding cases. If a prisoner does not play by the state's rules, a state need not address federal constitutional claims on their merits, and the state has a strong interest in the finality of its decision. *See Francis v. Henderson*, 425 U.S. 536 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

A state's finality interest is only implicated with merit claims because resolution of a merit claim in a petitioner's favor disturbs a state's criminal verdict. Gateway claims do not disturb a state conviction because resolution of those claims in a petitioner's favor only permits a federal court to continue its review of a state conviction. That distinction is critical. If a state conviction cannot be upset based upon a gateway claim, then the state's finality interest is not compelling. If the State's finality interest is not compelling, the procedural default analysis is not relevant. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Conner, J. dissenting) (procedural default concerns "whether the federal court will *consider* the merits of the claim, that is, whether the court has the *authority* to upset a judgment" (emphasis in original)).

In Carpenter's case, his gateway claim of ineffective appellate counsel was subject to the exhaustion doctrine because it presented a claimed constitutional violation. Therefore, Ohio had an obligation to enforce federal constitutional law and should have done so. But because resolution of Carpenter's ineffectiveness claim only permitted the district court to evaluate his illegal-plea claim,

resolution of the ineffectiveness claim did not threaten the finality of Carpenter's conviction. Therefore, the procedural default doctrine is not applicable to Carpenter's ineffectiveness claim.

The Sixth Circuit correctly understood that Carpenter's gateway and merit claims served different purposes. The Sixth Circuit did not apply the procedural default doctrine to Carpenter's ineffectiveness claim because Ohio's finality interest was not compelling at that stage of the analysis. Only after Carpenter met the extraordinarily high burden of proof required by *Strickland v. Washington*, 466 U.S. 668 (1984), could the Sixth Circuit address Carpenter's underlying merit claim. In the end, the Sixth Circuit determined that Ohio had no legitimate interest in the finality of Carpenter's conviction because it was responsible for appellate counsel's ineffectiveness, and Ohio was responsible for illegally obtaining Carpenter's plea.

C. THIS COURT HAS NEVER APPLIED THE PROCEDURAL DEFAULT DOCTRINE TO GATEWAY CLAIMS.

Historically, this Court has only applied the procedural default doctrine to merit claims. It is the Warden, not Carpenter, who wishes to break away from twenty years of this Court's precedent by adding yet another layer of procedural default analysis to a process already fraught with complexity and confusion.

For over twenty years, it has been this Court's practice to apply the procedural default doctrine in the evaluation of merit claims alone. *See Coleman v. Thompson*, 501

U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986); *Reed v. Ross*, 468 U.S. 1 (1984); *Engle v. Issac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S 536 (1976); and *McCleskey v. Zant*, 499 U.S. 467 (1991); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 19 (1992) (O'Connor J., dissenting) (noting that *Coleman*, *Murray*, *Reed*, *Engle*, *Sykes*, *Francis*, and *Zant*, all were only concerned with whether federal courts could consider the merits of a claim). Unable to present this Court with any authority that suggests the procedural default doctrine should be extended to cause arguments, the Warden attempts to accomplish his goal by relying upon the facts of *Murray v. Carrier*, 477 U.S. 478 (1986).

The Warden argues that *Carrier* stands for the proposition that a petitioner's gateway claim of ineffectiveness must not be procedurally defaulted in order for a federal court to consider it. Warden's Merit Brief, p. 23. The Warden supports his conclusion by arguing that Carrier's gateway claim was not procedurally defaulted; therefore, the Warden reasons, this Court properly considered it as cause for Carrier's defaulted merit claim. Warden's Merit Brief, p. 22. The Warden's analysis of *Carrier*, however, is incorrect.

There was no Sixth Amendment claim of ineffectiveness presented to this Court for review in *Carrier*.[7] In fact,

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[7] Even the Warden's *amici* do not agree with his assessment of *Carrier*. "Carrier had not raised an independent claim of assistance of counsel in state court. In fact the Court found that Carrier 'disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance of counsel claim.' " *Amici* Brief, p. 5.

this Court made a point of noting that Carrier abandoned his ineffectiveness claim in the Fourth Circuit and proceeded to this Court relying solely on the non-constitutional claim of "attorney inadvertence" as the cause for his defaulted merit claim. *Carrier*, 477 U.S. at 483.

Carrier's real gateway claim – an inadvertent mistake by counsel – was raised for the first time in the Fourth Circuit. *Id.* at 483. Even so, this Court considered whether that gateway claim was cause for the defaulted merit claim. Ultimately, Carrier's argument failed because his gateway claim did not amount to cause for the default of his merit claim. *Id.* at 489.

The Warden is accurate in one sense. *Carrier* held that when a constitutional violation is asserted as cause for a procedural default, the constitutional gateway claim should be exhausted. *Carrier*, 477 U.S. at 489. Through *Carrier*, this Court informed habeas petitioners that if they wish to assert ineffective assistance of counsel as cause, they have to: 1] present the ineffective assistance as an independent claim in state court; 2] assert an ineffective assistance claim that rises to the level of a Sixth Amendment violation; and 3] exhaust the ineffective-assistance-of-counsel-claim through the state courts. *Id.* at 488-489.

This Court's consideration of Carrier's non-constitutional gateway claim of attorney inadvertence despite the fact that it was procedurally defaulted, is telling. *Carrier* stands for the proposition that a gateway claim may be asserted as cause for the procedural default of another merit claim even if the gateway claim is procedurally defaulted. The very facts of *Carrier* demonstrate that.

Carpenter complied with *Carrier*. He presented his claim to Ohio through the appropriate procedural mechanism and, consistent with *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), he pursued it all the way to the Supreme Court of Ohio. The Warden conceded that Carpenter's ineffectiveness claim was exhausted, and the Sixth Circuit held that the claim was properly exhausted. J.A. 59.

Despite his concession in the district court, the Warden now paints Carpenter as depriving Ohio of an opportunity to address the merits of his ineffectiveness claim because Carpenter filed his Rule 26(B) application beyond the ninety-day period of an inconsistently applied rule. But as discussed in section II, *infra*, the Warden mischaracterizes the very rule upon which he relies. The Ohio appellate courts have full discretion to entertain an application for reopening filed beyond the ninety-day period if they determine "good cause" exists or that the claims themselves are meritorious. Rule 26(B) is not a bright-line test but a discretionary rule. If the State of Ohio wished to reopen Carpenter's direct appeal after reviewing his claims, it certainly could have. Indeed, Carpenter presented the claim to the Ohio courts at every available opportunity.

Principles of comity do not require placing a procedural default analysis on claims asserted as cause. The exhaustion requirement mandated by *Carrier* is sufficient because it ensures that a state court's available remedies are not ignored. The *Carrier* Court did not implement a procedural default requirement for claims asserted as cause, and one should not be engrafted now. Carpenter properly exhausted his ineffective-assistance-of-counsel

claim, and his underlying illegal-plea claim is meritorious.

Just last term, this Court implicitly rejected the Warden's "double procedural default analysis" argument in *Strickler v. Greene*, 119 S. Ct. 1936 (1999). In *Strickler*, the habeas petitioner discovered a valid *Brady v. Maryland*, 373 U.S. 83 (1963), claim while his case was pending in federal court. Strickler conceded that the claim was procedurally defaulted. The cause arguments advanced to excuse the default of the *Brady* claim were the same as the underlying facts of the *Brady* claim itself; therefore, Strickler's merit claim and his gateway claim were both procedurally defaulted.

Despite the "double default", this Court considered the facts of the *Brady* claim as cause for Strickler's merit claim. *Strickler*, 119 S. Ct. at 1949. Because two of the three components of the *Brady* test mirror the traditional cause and prejudice test, the *Strickler* Court determined that it could consider the *Brady* elements as cause for the procedural default. *Id.* There was no need to engage in a separate analysis of the procedural default, this Court held, because the *Brady* claim itself accommodated all of the interests the cause and prejudice test is designed to protect. *Id.* at 1949.

Strickler suggests that employing the cause and prejudice test twice with respect to a *Brady* claim (once to the defaulted merit claim and once to the gateway claim) to reach the merits of a procedurally defaulted claim is a redundant exercise. The same can be said when ineffectiveness is asserted as the cause for a procedurally defaulted merit claim. Even assuming that a state has

some compelling interest that is implicated at the gate-keeping stage, the extraordinarily high burden imposed by *Strickland v. Washington*, 466 U.S. 668 (1984), accommodates all of a state's interests that are traditionally protected by the procedural default doctrine. This Court said as much in *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

In *Kimmelman*, this Court held that only by meeting the extraordinarily high burden of *Strickland* can a habeas petitioner secure relief even though the ineffectiveness is predicated on a defaulted Fourth Amendment claim. In doing so, this Court specifically rejected the argument that state interests could not be adequately protected if federal courts could consider defaulted Fourth Amendment claims in the context of attorney ineffectiveness. *Kimmelman*, 477 U.S. at 380-381.

Because *Strickland* is such a highly demanding test, this Court also rejected the notion, raised by the Warden's *Amici*, that applying *Strickland* to reach the merits of an otherwise defaulted Fourth Amendment claim would disturb a great many state-court judgments. *Amici* Brief, p. ii. To the contrary, the *Kimmelman* Court held that the mere assertion of ineffective assistance of counsel does not automatically cure the procedural default of a merit claim:

> Petitioners [the Warden] predict that every Fourth Amendment claim that fails or is defaulted in state court will be fully litigated in federal habeas proceedings in Sixth Amendment guise, and that, as a result, many state-court judgments will be disturbed. They seem to believe that a prisoner need only allege ineffective assistance, and if he has an underlying meritorious Fourth Amendment claim, the writ will issue and the State will be obligated to retry him without the challenged evidence. Because it ignores the rigorous standard which *Strickland* erected for ineffective assistance claims, petitioners' forecast is simply incorrect.

Kimmelman, 477 U.S. at 381. "A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a conviction is necessary to ensure a fair and just result." *Id.* at 393 (Rehnquist, J., concurring in judgment).

The same can be said here. It is only after Carpenter completely exhausted his ineffectiveness claim and satisfied *Strickland* that the Sixth Circuit reached his underlying merit claim. By satisfying and exhausting his ineffective-assistance-of-counsel claim, Carpenter did not subvert any state interests.

Carpenter's case demonstrates the inherent inequity in the Warden's argument. Carpenter was denied the effective assistance of counsel on appeal because his illegal-plea claim was not raised – conduct that must be attributed to the State of Ohio. *Kimmelman*, 477 U.S. at 379; *Carrier*, 477 U.S. at 488. The merits of that claim were not reviewed by the Ohio courts because they relied upon an inadequate and fundamentally unfair rule to bar consideration of Carpenter's ineffectiveness claim. J.A. 43. The Warden now wants to rely upon the purported default Ohio caused and Ohio's unfair refusal to remedy the problem as a means of restricting the federal courts from even entertaining the notion Carpenter's illegal-plea

claim might have merit. Carpenter has done nothing wrong. If equitable considerations truly guide the use of the Great Writ, then Carpenter should be permitted to divorce himself from the very state process that has caused his claims to go unnoticed for ten years.

D. WHETHER A PROCEDURAL DEFAULT MAY BE EXCUSED PRESENTS A QUESTION OF PURE FEDERAL, PROCEDURAL LAW.

Aside from the conceptual difference between merit claims and gateway claims, there is another, and perhaps simpler, reason why gateway claims need not be subjected to a procedural default analysis. Whether a cognizable procedural default has occurred is purely a question of federal procedural law. Unlike substantive, federal constitutional matters, state and federal courts do not have a concomitant obligation to apply federal procedural law. *See Boerckel*, 119 S. Ct. at 1732. Thus, the federal courts should not be constrained by state decisions when deciding the procedural question of whether to exercise their discretion and consider if a petitioner may apply for the writ of habeas corpus.

The Warden draws no distinction between merit claims and gateway claims and believes that the states determine the scope of federal review. But *Carrier* itself held that a state has no business deciding matters of federal procedural law:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of

> ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal court can adjudicate the question of cause – a question of federal law – without deciding an independent and unexhausted constitutional claim on the merits.

Carrier, 477 U.S. at 488-89 (citations omitted).

If a gateway claim asserts a denial of a federal constitutional right, it must be exhausted. *Carrier*, 477 U.S. at 489. But that is as far as the states' involvement should go especially when a claim of ineffective assistance is advanced to excuse a procedural default. To hold otherwise would strip federal courts of the ability to determine how and when they should entertain the merits of a habeas corpus petition.

Exhaustion is enough in this case because it is only concerned with whether Carpenter presented his claim of appellate ineffectiveness to Ohio. He did so. Ohio did not address Carpenter's ineffectiveness claim – not because the Ohio courts were unable to address the claim but because they chose not to.

Because the appellate-ineffectiveness claim is advanced here to explain the purported federal default of Carpenter's illegal-plea claim, Ohio's interest in the finality of Carpenter's conviction is not compelling. Carpenter does not seek relief based upon his gateway claim. He is only using it to explain what happened with respect to

his illegal-plea claim – a question of pure, federal procedural law and one that does not impact Ohio's interest in the finality of Carpenter's conviction. For those reasons, exhaustion is enough.

IV

EXTENDING *SYKES* WOULD COST MORE MONEY, DELAY THE RESOLUTION OF HABEAS CASES, AND MARK A RETREAT FROM THIS COURT'S PRECEDENT.

Accepting the Warden's invitation to extend *Sykes* to cause arguments will cost more money and further delay the resolution of habeas corpus cases, thereby impeding the efficiency of the federal courts. As a practical matter, extending *Sykes* will require another round of procedural default litigation before a federal court may exercise its discretion to review habeas claims.

The only opportunity for a state to raise the *Sykes* affirmative defense to the cause and prejudice arguments is after a prisoner offers a cause and prejudice argument in his traverse. Thus, states would be required to file a sur-reply or a separate pleading regarding the alleged procedural default. The petitioner would respond to that pleading and file additional pleadings for discovery, supplementation of the record or for evidentiary proceedings to contest the alleged procedural default. Only then could a federal court effectively consider whether there is a cognizable procedural default for a petitioner's asserted cause argument, and if so, whether the prisoner has offered adequate cause to excuse the procedural default as to his first layer of cause. Simply put, habeas costs

would rise by requiring the federal court's consideration of these additional federal issues.[8]

In *Withrow v. Williams*, 507 U.S. 680, 693-694 (1993), this Court addressed a similar cost issue when it decided that *Stone v. Powell*, 428 U.S. 465 (1976), did not prohibit the consideration of *Miranda* claims in federal habeas proceedings. This Court indicated:

> We likewise fail to see how purporting to eliminate *Miranda* issues from federal habeas would go very far to relieve such tensions as *Miranda* may now raise between the two judicial systems. Relegation of habeas petitioners to straight involuntariness claims *would not likely reduce the amount of litigation*, and each such claim would in any event present a legal question requiring an "independent federal determination" on habeas.

Withrow, 507 U.S. at 694 (emphasis added) (citation omitted).

If the Warden's argument is accepted, there will be additional burdens imposed upon a federal court as it answers the Warden's proposed federal questions. The federal court would be required to expend more time and resources to wade through the added filings and proceedings concerning those federal questions. As a practical matter, the court would be required to determine the federal question whether the alleged procedural default

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[8] Not mentioned by the Warden is the obvious point that if a petitioner has procedurally defaulted his gateway cause argument, then more than likely he has also procedurally defaulted his pre-gateway cause argument. The habeas remedy would become a perpetual abyss of procedural default.

of the gateway cause argument is a cognizable procedural default under *Sykes*.[9] If a warden satisfies *Sykes*, the federal court would be required to then determine the federal question whether a petitioner has cause and prejudice for the default of his gateway cause arguments, or can meet the manifest-miscarriage-of-justice exception.[10] By imposing a requirement that a court answer the added federal questions, there would be an increase in the litigation before the court and an increase in the burdens imposed upon a federal court.

The Warden's request would inject more doctrinal complexity into an already intricate system of threshold rules, which go only to the satellite question whether federal habeas courts can exercise the jurisdiction that Congress has given them by statute. The very point of *Carrier* was to make the job of habeas courts manageable by giving them a familiar (and demanding) standard to apply, i.e., *Strickland*. *Carrier*, 477 U.S. at 488-489 (*Strickland* test decreases costs to federal judiciary as opposed to inadvertence of counsel test).

The Warden invites this Court to blur the distinction between the exhaustion and procedural default doctrines. Last term, this Court reaffirmed its long-standing view

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[9] If answered negatively, the federal court would be required to return to the federal question concerning the gateway cause argument raised in response to a cognizable procedural default of the merits claim.

[10] If answered affirmatively, the federal court would be required to return to the federal question concerning the gateway cause argument raised in response to a cognizable procedural default of the merits claim.

that the exhaustion and procedural default doctrines involve distinct issues that serve different interests. *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1734 (1999); 119 S. Ct. at 1736-1737 (Stevens, J., Dissenting). *See also Sykes*, 433 U.S. at 78-79; *Engle v. Isaac*, 456 U.S. 107, 125-126 n. 28 (1982). The Warden now asks this Court to abandon these precedents and ignore the distinction between the two doctrines. He does so without offering a compelling reason to do so.

Accepting the Warden's invitation would further tax federal judicial resources. For those reasons, Carpenter urges this Court to decline the Warden's invitation to extend *Sykes* to cause arguments.

CONCLUSION

Robert W. Carpenter respectfully requests that the Warden's Writ of Certiorari be dismissed. In the alternative, Carpenter respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

Rule 26 of the Ohio Rules of Appellate Procedure:

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the

appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the

filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The

parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

Former Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):

After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to *rule on an application for reconsideration* filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Current Rule II(2)(D)(1) of the Supreme Court Rules of Practice:

S. Ct. Prac. R. II(2)(D)(1):

After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, *except* to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to Rule 26 of the Rules of Appellate Procedure, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

Franklin County Court of Common Pleas

[Caption Omitted In Printing]

Trial Transcript

* * *

[15] EXPLAIN TO THE COURT AND TO WHOEVER WHO IS WILLING TO LISTEN WHAT HAPPENED THAT NIGHT, AND THAT HE HIMSELF DID NOT KILL MRS. YOUNG, BUT THAT HE WOULD STILL AGREE TO ENTER A GUILTY PLEA IN ORDER TO AVOID THE IMPOSITION OR THE POSSIBILITY OF THE IMPOSITION OF THE DEATH PENALTY.

IS THAT YOUR UNDERSTANDING? DOES THAT ANSWER YOUR QUESTION, ROBERT

THE DEFENDANT: YES, SIR.

THE COURT: DOES THE STATE WISH TO COMMENT ONE WAY OR ANOTHER?

MR. HOGAN: NO, YOUR HONOR. IT WAS EXPLAINED TO US EARLY ON IN THESE PLEA NEGOTIATIONS THAT THE PLEA WOULD BE AN ALFRED PLEA.

THE COURT: OKAY. IN VIEW OF THE FACT, MR. CARPENTER, THAT YOUR COUNSEL HAS ADVISED THE PANEL THAT YOU'RE ENTERING THIS PLEA WITH THE UNDERSTANDING THAT YOU'RE DOING IT TO AVOID THE CONSEQUENCES OF GOING TO TRIAL, AND THAT YOU ARE NOT ADMITTING THAT YOU INTENTIONALLY CAUSED THE DEATH OF THELMA YOUNG, THELMA?

MR. SIMMONS: THAT'S CORRECT.

THE COURT: WHAT THE PANEL WILL HAVE TO DO I THINK IN THAT REGARD PROCEDURALLY IS THAT [16] WE'LL RESERVE ACCEPTING THIS PLEA OF GUILTY UNTIL WE HEAR A RENDITION OF THE FACTS BY THE STATE OF OHIO AND THEIR STATEMENT OF THE PANEL CONCERNING WHAT THEY BELIEVE THE FACTS IN THIS CASE WILL BE. AND THEN WE'LL LISTEN TO YOUR COUNSEL'S RESPONSE TO THOSE FACTS.

THE DEFENDANT: I HAVE A QUESTION ON THAT, SIR.

THE COURT: VERY WELL.

THE DEFENDANT: IF YOU PUT MY GUILTY PLEA TO THE SIDE AND THEN I GET UP AND GIVE MY STATEMENT ON WHAT REALLY HAPPENED THAT NIGHT, AND THEN YOU DECIDE TO WHERE YOU WANT TO DROP THE GUILTY PLEA AND TAKE ME TO COURT, THAT'S EXPOSING MY RIGHT AS A PROPER DEFENSE FOR MYSELF, IF I HAVE TO GO THAT ROUTE.

THE COURT: MR. CARPENTER, IN AN ALFRED PLEA, AS I UNDERSTAND IT, THE COURT IS OBLIGATED TO WITHHOLD ACCEPTANCE OF A PLEA UNTIL IT HEARS THE FACTS STATED BY THE STATE THAT TOUCHES ALL THE ESSENTIAL ELEMENTS OF THE CRIME ALLEGED IN THE INDICTMENT. AND DEPENDING UPON HOW THE DEFENSE RESPONDS TO THAT, WILL DEPEND UPON WHETHER THE COURT WILL ACCEPT THE GUILTY PLEA OR NOT.

IF, FOR EXAMPLE, THE STATE DIDN'T PRESENT [17] FACTS TO THE PANEL THAT TOUCHED ALL THE ESSENTIAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT, INCLUDING THE SPECIFICATIONS, THEN THE COURT WOULD BE OBLIGATED NOT TO ACCEPT THE PLEA.

NOW, I TAKE IT THAT UNDER THIS TYPE OF PROCEDURE THE STATE'S GOING, OR THE DEFENSE IS GOING TO STAND MOOT TO THE STATEMENT BY THE STATE AS TO WHAT THE FACTS ARE. YOU ARE NEITHER ADMITTING THEM NOR ARE YOU CHALLENGING THEM. AND IN THAT EVENT, THAT THE PANEL MOST LIKELY WILL ACCEPT THE STATE'S RENDITION OF THE FACTS IN THIS CASE.

THAT'S WHAT HAPPENS UNDER AN ALFRED PLEA. NOW, IF YOU WANT TO RECONSIDER THAT AT THIS TIME, YOU MAY DO SO.

MR. SIMMONS: IF I COULD ADD SOMETHING, YOUR HONOR.

THE COURT: THAT'S THE PROCEDURE THAT THE –

MR. SIMMONS: UNDER RULE 11, SPECIFICALLY RULE 11-C-3, IT READS INDICTMENT CONTAINS ONE OR MORE SPECIFICATIONS WHICH ARE NOT DISMISSED, UPON ACCEPTANCE OF THE PLEA OF GUILTY OR NO CONTEST TO THE CHARGE OR IF PLEAS OF GUILTY OR NO CONTEST TO BOTH OF THE CHARGES IN ONE OR

* * *

Ohio Court of Appeals
For the Tenth District

[Caption Omitted In Printing]

Carpenter's Application for Reopening

* * *

[1] Defendant-Appellant, Robert Carpenter ("Defendant"), respectfully makes application to this Court pursuant to App. R. 26(B) for an order granting him leave to reopen this appeal based on a claim of ineffective assistance of appellate counsel, and, in support thereof, states the following:

(a)

Reopening is sought in the Tenth District Court of Appeals Case No. 90AP-803, which was a direct appeal from the judgment of conviction and sentence entered by the Franklin County court of Common Pleas in Case No. 88CR-11-3707.

(b)

Defendant believes that good cause exists for the filing of this Application to reopen more than ninety days after the journalization of this Court's judgment in Case No. 90AP-803 because his appointed counsel in the direct appeal did not advise him of his right to seek court review of the issue raised by the assignment of error listed in part (c) of this Application, either during the pendency of the appeal, or during the ninety-day period after judgment, as; more fully appears in the attached supplemental affidavit; and in any event, App. R. 26(B)

and its ninety-day limitation were not in effect at the time the appeal was decided.

(c)

Defendant states that the following assignment of error was not considered by any appellate court because of appellate counsel's deficient representation:

Assignment of Error No. 2:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEAS FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

* * *

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[11] **AFFIDAVIT**

State of Ohio :
ss.,
County of Pickaway :

Robert Carpenter, being first duly sworn, deposes and says that the Office of the Franklin County Public Defender was appointed to represent me in a direct

appeal from the judgment of conviction and sentence entered by the court of common pleas in case no. 88CR-11-3707; that at the time the direct appeal was taken (and to this day) I was a laymen with no knowledge of, or education, or training in, criminal law and procedure; that the Assistant Public Defender assigned to handle my direct appeal under case no. 90AP-803 did not meet with me at any time to discuss the appeal, although it was my request that he do so; that I spoke with him by phone before the appeal brief was drafted and filed, and advised him that I desired to meet with him to review the brief prior to filing; that appointed counsel proceeded to file the brief without allowing me the opportunity to inspect and review it; that at the time my direct appeal was taken, I was not aware that I had a right to raise an assignment of error directed to the sufficiency of the evidence, and was not informed of this right; that had I been informed of this right, I would have requested my counsel to raise in my direct appeal an assignment of error directed to the issue of the sufficiency of evidence necessary to support my conviction for aggravated murder; that I recently learned through new counsel of my right to raise such assignment of error; that I believe the assignment of error has merit; that these circumstances prevented me from filing an application to reopen my appeal earlier; and that these circumstances are believed by me to constitute good cause for

* * *

Ohio Court of Appeals

[Caption Omitted In Printing]

Memorandum in Opposition, Pages 4-5

* * *

C. THE OHIO CONSTITUTION PRECLUDES CONSIDERATION OF AN "APPLICATION FOR REOPENING," WHEN THE APPLICATION WAS FILED AFTER THE TIME FOR APPEAL TO THE OHIO SUPREME COURT HAS PASSED.

The Ohio Constitution limits the jurisdiction of this Court. Section 3(B)(3), Article IV, of the Ohio Constitution states that "[j]udgments of the courts of appeals are final except as provided in section 2(B)(2) of this article." Section 2(B)(2) in turn defines the appellate jurisdiction of the Ohio Supreme Court to review judgments of the courts of appeals. The "final judgment" language of Section 3(B)(3) has prompted the Ohio Supreme court to state, as follows:

> . . . Section 3(B)(3) . . . provides that appellate judgments are final unless appealed as of right or by a request for this court's discretionary review pursuant to Section 2(B)(2), Article IV, Ohio Constitution. ***The effect of this deadline is clear – if no such appeal is filed, the judgment is binding and no longer subject to the court of appeals' jurisdiction to reconsider.***

State, ex rel. LTV Steel, v. Gwin (1992), 64 Ohio St. 3d 245, 249-50 (emphasis added). In *Gwin*, the respondent appellate judges could "provide no precedent that establishes a court of appeals' jurisdiction to reconsider a judgment

after the deadline I Section 3(B)(3), Article IV, Ohio Constitution." **Id.** at 250. The ***Gwin*** Court concluded that the appellate court judges "had no jurisdiction to reconsider the judgment . . . *sua sponte* more than five months after the judgment was entered." **Id.** at 250.

Given the language in **Gwin**, this Court does not retain jurisdiction to reconsider an appellate judgment that is over three years old. The State can imagine no reasonable interpretation of the "final judgment" language of Section 3(B)(3) that would allow this Court to reconsider its judgment over three years after that judgment.

For purposes of this case, it is not necessary to determine whether the "final judgment" language of Section 3(B)(3) invalidates the ninety-day time period set for applications for reopening in Appellate Rule 26(B). That rule does not apply to defendant, and defendant did not meet the ninety-day deadline. It would suffice to say that this Court's jurisdiction to reconsider expired at some point in the three years before defendant files his "application for reopening." Because of this lack of jurisdiction, this Court should deny defendant's application.

* * *

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT FACT SHEET FOR STATE HABEAS CORPUS APPEALS (2254)

Case Name and Number: ROBERT W. CARPENTER V. GARY C. MOHR, WARDEN, NO. 97-3392

Person Reporting: JON . WALDEN, AAG, Capital Crimes Section

1. Has this conviction(s) been previously litigated in the United States Courts?

   ( ) Yes (X) No

   If yes, give brief history: N/A

2. Constitutional violation claims (name constitutional provision and briefly recite facts asserted as violative):

   a. Fourteenth Amendment right to due process violated by conviction based on insufficient evidence.

   b. Sixth Amendment right to effective assistance of counsel violated by ineffective representation on first appeal as of right.

3. Have remedies been exhausted as to claims listed above?

   a. (X) Yes ( ) No

   b. (X) Yes ( ) No

4. Are there fact disputes concerning claims?

   ( ) Yes (X) No

   If "yes," were they resolved by the District Court

   ( ) at a hearing?

   ( ) by review of the state court record?

   ( ) by reference to a Magistrate?

5. Does the state argue that any constitutional violations, if found, were harmless beyond reasonable doubt?

   ( ) Yes (X) No

   If "yes," briefly state why and cite to the district court record entry pages claims as proof.

Ohio Rev. Code. Ann. § 2945.06:

2945.06 JURISDICTION OF JUDGE WHEN JURY TRIAL IS WAIVED; THREE-JUDGE COURT

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated

for his services as provided by section 141.07 of the Revised Code.

Ohio R. Crim. P. 11:

CRIM R 11 PLEAS, RIGHTS UPON PLEA

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in

divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a

reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying

agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Supreme Court, U.S.
FILED
FEB 17 2000
CLERK

No. 98-2060

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In our opening brief, we explained why procedural default analysis should apply to a Sixth Amendment ineffective-assistance-of-counsel claim when that claim is presented to a federal habeas court, not only for its own sake, but also as the "cause" for the default of another habeas claim. Nothing that respondent Carpenter has said in his brief diminishes the strength of our position. Indeed, Carpenter tries to avoid the question presented by arguing that the writ should be dismissed as improvidently granted. But his effort to deflect this Court from the question presented is unfounded. The question presented is properly before this Court and, resolving this question in our favor, the Court should reverse the judgment of the court of appeals and remand for further proceedings.

I. Respondent Offers No Sound Reason Why Procedural Default Analysis Should Not Apply.

Our opening brief (pages 20-25) showed the logic of our position, given propositions already established in *Murray v. Carrier*, 477 U.S. 478 (1986), and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Because the exhaustion requirement applies to a Sixth Amendment ineffectiveness claim asserted as cause for a procedural default (*Carrier*), and because the procedural default doctrine protects the integrity of the exhaustion requirement (*O'Sullivan*), it follows that the procedural default doctrine should also apply to an ineffectiveness claim asserted as cause for another procedural default.

Moreover, our opening brief (pages 27-28) also showed the good sense in this position. To exempt this Sixth Amendment claim from the procedural default doctrine, which applies uniformly to all other habeas claims, would create the anomalous result that a prisoner, with impunity,

could deliberately ignore a State's deadline for filing this kind of claim. Under the court of appeals' rule, now supported by Carpenter, an intentionally defaulting prisoner would be no worse off than a prisoner who complied with the deadline. This result certainly conflicts with the well-established respect that a federal habeas court must give to state-court deadlines.

A. The Relevant Precedents Support The State.

Respondent Carpenter mistakenly asserts that several of the cases cited in our opening brief support his position rather than ours.

1. *Carrier*. – In claiming that "*Carrier* stands for the proposition that a gateway claim may be asserted as cause for the procedural default of another merit claim even if the gateway claim is procedurally defaulted" (Resp. Br. at 37), Carpenter severely misstates the holding of that case. *Carrier* was a case in which a habeas petitioner asserted attorney error as the reason for failing to properly present a *Brady* claim on direct appeal. *See Brady v. Maryland*, 373 U.S. 83 (1963). The district court in *Carrier* ruled that, before asserting attorney error as cause for a procedural default on direct appeal, a prisoner must exhaust available state post-conviction proceedings for claiming ineffective assistance of counsel. *See* 477 U.S. at 483. The court of appeals in *Carrier* reversed, holding that attorney error need not be so egregious as to violate the Sixth Amendment in order to constitute cause for procedural default purposes, and that an attorney-error-as-cause claim need not be exhausted. *See id.* at 484. This Court, in turn, reversed, holding that the Fourth Circuit was wrong to think that attorney error can serve as cause without meeting the standard for establishing a Sixth Amendment violation. And the Court further observed

that, because only Sixth Amendment violations can serve as cause, a habeas petitioner must exhaust available state-court proceedings to redress a Sixth Amendment violation.

Contrary to Carpenter's suggestion (Resp. Br. at 37), the Court in *Carrier* did not evaluate a separate "non-constitutional [gateway] claim of 'attorney inadvertence'" to see if, on the facts, it was strong enough to establish cause for the procedural default of the *Brady* claim. Instead, in reviewing the court of appeals, this Court ruled categorically that attorney error may never serve as a "gateway claim" unless it can also stand on its own as a meritorious Sixth Amendment claim. In any event, even understood as a separate "non-constitutional gateway claim," this "non-constitutional" claim of attorney error was not "procedurally defaulted," as Carpenter asserts, simply because it was raised for the first time in the Fourth Circuit. The procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), applies to claims not properly presented in *state court*, where the *state court* has refused to consider the merits of the claim because of the procedural default. By contrast, in *Carrier*, the whole issue of attorney error was raised for the first time in federal district court, but that fact alone did not make any ineffectiveness claim procedurally defaulted. On the contrary, the key point – as both the district court and this Court noted – was that a state-court remedy for a Sixth Amendment claim still appeared available, and thus the prisoner there was required to exhaust this remedy first.

Consequently, in no way can *Carrier* be said to stand for the proposition that a procedurally defaulted "gateway" claim may serve as cause for another procedural default where no cause has been shown for the default of the "gateway" claim itself. Simply put, *Carrier* did not involve a procedurally defaulted claim of ineffectiveness, and so

Carrier did not resolve the issue now before this Court. But, if anything, the logic of *Carrier* would suggest that the procedural default doctrine, like the exhaustion doctrine, should apply before a federal habeas court addresses whether a Sixth Amendment violation has occurred. There is no point in requiring exhaustion, as *Carrier* did, if that requirement can be satisfied simply by letting the clock run out on the state-court deadline.

2. *O'Sullivan.* – Insofar as Carpenter relies on *O'Sullivan*, that reliance is misplaced. As all nine Members of this Court agreed in *O'Sullivan*, the procedural default doctrine serves "'to protect the integrity' of the federal exhaustion rule," 526 U.S. at ___, 119 S. Ct. at 1734, quoting *id.* at 1736 (Stevens, J., dissenting), and does so by making sure that a prisoner "has *properly* exhausted [his state] remedies." *Id.* at 1734 (emphasis added). Otherwise, "a prisoner could evade the exhaustion requirement – and thereby undercut the values it serves – by 'letting the time run' on state remedies." *Id.*, quoting *id.* at 1737 (Stevens, J., dissenting). Thus, there should be unanimity here that the Sixth Circuit was wrong to hold that exhaustion alone (without any procedural default inquiry) applies when a Sixth Amendment claim is asserted as cause.

3. *Strickler.* – Likewise, *Strickler v. Greene*, 119 S. Ct. 1936 (1999), does not support Carpenter's position that a federal habeas court may ignore – without any showing of cause – the procedural default of a Sixth Amendment claim asserted as cause for another default. *Strickler* concerned a defaulted *Brady* claim, and this Court held that the cause of the default was the prosecution's very act of withholding evidence, along with other factors. In other words, as Carpenter says, the "cause arguments . . . were the same as the underlying facts of the *Brady* claim." Resp. Br. at 39.

Here, however, neither of Carpenter's two state-court defaults fits the *Strickler* model. First, the asserted cause for failing on direct appeal to contest the prosecution's method of presenting the factual basis for Carpenter's *Alford* plea is not that method of presentation itself, but instead appellate counsel's alleged incompetence in not attacking the validity of the plea. Second, the asserted cause for Carpenter's failure to present a Sixth Amendment claim in 1993, within 90 days of Rule 26(B)'s effective date, is not his appellate counsel's alleged incompetence in 1990 in failing to challenge the plea on direct appeal. In any event, whatever might be asserted as cause for Carpenter's untimely Rule 26(B) filing – an issue neither the district court nor court of appeals addressed – the key point is some such cause must be shown. On remand, Carpenter should be put to this test, and although we do not think that he could satisfy the test with a *Strickler*-like self-satisfying cause, an attempt of this sort would at least be responsive to the required inquiry.

Thus, *Strickler* simply confirms the necessity of establishing cause for a procedural default. Unlike the Sixth Circuit here, this Court in *Strickler* did not abandon that requirement. Holding that the same facts underlying a *Brady* claim may also serve as cause for the default of the *Brady* claim itself is not the same as holding the cause requirement unnecessary.

4. *LaGrand.* – Contrary to Carpenter's suggestion, we do not argue that *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999) (*per curiam*), definitively resolves the question presented in this case. We do claim, however, that the Court's opinion displayed the right approach for how to resolve this question. Whether in dicta or as an alternative holding to support its judgment vacating the Ninth Circuit's

order in that case, this Court did say that an ineffective assistance claim "fails" to serve "as cause" for the "addition[al]" reason that "the ineffective assistance claim is, itself, procedurally defaulted." *Id.* at 1021.

B. This Court's "Actual Innocence" Cases Do Not Support Carpenter's Position.

Carpenter attempts to support his position using this Court's "actual innocence" cases. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993). But those cases are inapposite. The "actual innocence" inquiry concerns an entirely separate exception to the procedural default doctrine from the "cause and prejudice" test – namely the "fundamental miscarriage of justice" alternative. *See Carrier*, 477 U.S. at 495-96. The same considerations of finality and federalism that underlie the cause-and-prejudice test simply do not apply when a prisoner can make the requisite showing of actual innocence. For this reason, a federal habeas court will reach the merits of a procedurally defaulted constitutional claim – even absent any showing of cause – in the "extraordinary" event that the prisoner can show actual innocence. *Schlup*, 513 U.S. at 321-22, quoting *Carrier*, 477 U.S. at 496.

But, in the absence of actual innocence, there is no similar imperative to review a defaulted claim, and the interests in finality and federalism remain paramount. When a prisoner asserts a second constitutional claim to justify his failure to raise an earlier constitutional claim, but the prisoner has also missed the state court's deadline for presenting this second claim, it is no "fundamental miscarriage of justice" to insist that the prisoner explain his failure to meet the second deadline as well as the first. The Court's actual innocence cases do not support the Sixth Circuit's decision in this case,

for this Court has never suggested that its "safety valve for the extraordinary case," *Schlup*, 513 U.S. at 333 (O'Connor, J., concurring) (internal quotation omitted), ought to apply to a very ordinary case like this one involving a missed state-court deadline for raising an ineffective-assistance claim.

If Carpenter himself could show actual innocence, a federal habeas court would reach the merits of his "illegal plea" claim (insofar as it is a federal claim about the particular procedures that Due Process requires for demonstrating the factual basis of an *Alford* plea). There would be no need to consider whether the failure of Carpenter's counsel to raise this "illegal plea" claim on direct appeal violated the Sixth Amendment. Because Carpenter cannot show actual innocence, however, he must establish that the performance of his appellate counsel was sufficiently egregious to violate the Sixth Amendment. But Carpenter had an opportunity to present this Sixth Amendment claim in state court. He missed that opportunity. There would be no "fundamental miscarriage of justice" in requiring him to explain why he did so, and nothing in *Schlup* or *Herrera* suggests that Ohio – having set a deadline by which state prisoners must bring an ineffective-assistance-of-appellate-counsel claim to the attention of state courts for review and correction there – is not entitled to expect federal courts to respect that deadline just as its own courts do.

If the States set and enforce rules for the timely assertion of either gateway or merit claims, the legitimate state interests that justify those rules in the first place – the States' interests in finality, in an early resolution of constitutional claims in the most appropriate forum, and their earnest desire to review and correct alleged constitutional violations themselves – are just as strong in either case, and federal courts do not honor those state rules by ignoring them

for gateway claims while enforcing them for merit claims. Carpenter's on-again, off-again approach to comity and federalism here is wrong, for it is "based on a conception of federal/state relations that undervalue[s] the importance of state procedural rules." *Coleman*, 501 U.S. at 750.

C. Uniform Application Of Procedural Default Analysis To All Ineffective Assistance Claims Will Not Add Costs Or Delay Litigation.

Carpenter contends that applying procedural default analysis to Sixth Amendment claims asserted as cause for other defaults will add costs or delays to the resolution of habeas cases. This contention is not true. Because *Carrier* requires an ineffectiveness claim to be meritorious as a freestanding Sixth Amendment claim in order to serve as cause for a default, any such claim alleged as cause for a default will be pleaded in a habeas petition as an independent habeas claim, as was Carpenter's Sixth Amendment claim here. J.A. 29.

Whenever a Sixth Amendment ineffectiveness claim pleaded in a habeas petition is procedurally defaulted, the federal habeas court already must ascertain whether there is cause for (and prejudice from) this default in order to address the merits of this claim as a freestanding basis for relief. *Coleman* so holds, as did the Sixth Circuit itself. Thus, it would not require the federal habeas court any more time or effort to apply the cause-and-prejudice inquiry to that Sixth Amendment claim when the prisoner offers it as cause for another default. In short, there is no basis for believing that it would impose any additional burdens on a federal habeas court to require the same procedural default analysis for the same Sixth Amendment claim, whether that claim functions in freestanding or gateway mode.

Moreover, contrary to Carpenter's suggestion (Resp. Br. at 45-46), the rule we urge the Court to adopt will generate no uncertainty in habeas law. We ask only that the principle of uniformity explicitly articulated in *Coleman* be recognized to govern a defaulted Sixth Amendment claim in its gateway as well as independent role. *See Coleman*, 501 U.S. at 750-51 ("uniformly" applying the cause-and-prejudice test to "all" procedurally defaulted claims presented for federal habeas review). Indeed, the specific holding we seek from this Court is even simpler and easier to understand and administer: the procedural default doctrine applies to all Sixth Amendment claims to which *Carrier* has already imposed the exhaustion requirement.

Far from "inject[ing] more doctrinal complexity" into habeas law (Resp. Br. at 46), confirming that both exhaustion and procedural default rules apply to Sixth Amendment claims asserted as cause would close an unnecessary and unfortunate loophole created by the Sixth Circuit. It is the Sixth Circuit's exception to the otherwise uniform application of procedural default analysis that is counter-intuitive, and, if upheld, would generate considerable uncertainty – as prisoners inevitably would attempt to expand or analogize this exception.

D. Carpenter's Rule Would Permit The "Deliberate Bypass" Of A State's Processes For Presenting Ineffectiveness Claims As Grounds For Reviving Claims Defaulted On Direct Appeal.

Carpenter states that we offer no reason to justify applying procedural default analysis to Sixth Amendment claims asserted as cause for another default. But the concern identified by all nine Justices in *O'Sullivan* is reason enough:

unless the procedural default doctrine applies to claims governed by the *Carrier* exhaustion requirement, prisoners will be able to render that exhaustion requirement meaningless by intentionally ignoring a State's deadline for presenting these claims. Not even the now-overruled "deliberate bypass" standard articulated in *Fay v. Noia*, 372 U.S. 391 (1963), would tolerate this result. Yet that result is what Carpenter's rule would permit.

Carpenter argues that exhaustion suffices to serve the State's interest at least in this case because Carpenter did present his Sixth Amendment claim to state court, and the state court could have invoked the "good cause" component of Rule 26(B) to reach the merits of that claim. This argument, however, is incorrect for at least two different reasons. First, it rests on a misunderstanding of Rule 26(B) itself. That Rule does not permit a state appellate court to pick whichever late ineffectiveness claims it wishes to address on the merits. Instead, like the cause component of this Court's own procedural default doctrine, the "good cause" provision of Rule 26(B) operates as a limited exception to an otherwise firm procedural bar. *See, e.g., State v. Winstead*, 74 Ohio St. 3d 277, 658 N.E.2d 722 (1996) (one-day delay in filing because of failure of overnight courier service is not "good cause"). Absent a "good cause" showing by the prisoner explaining his failure to meet the State's deadline, state courts will not and ought not review the merits of those late ineffective-assistance claims, just as they did not do so here.

Second, Carpenter's purported distinction between gateway and merits claims, for procedural default purposes, would apply even if there were no "good cause" exception to Ohio's 90-day deadline for filing an ineffective-assistance claim. According to Carpenter's position, then, a prisoner

could deliberately ignore an absolute 90-day deadline and still proceed in federal habeas to assert the ineffectiveness claim as cause for the first default on direct appeal. After all, the exhaustion requirement is satisfied when the clock has run on a fixed 90-day deadline. The federal habeas court could then overturn the result of the state-court direct appeal, *even though the State had its own procedure for considering whether to overturn the judgment, and even though the prisoner had deliberately bypassed this state procedure.*[1]

Furthermore, the affront to federalism is the same whether a State adopts an invariable deadline, with no exceptions whatsoever, or whether instead the State is willing to excuse a late filing in the exceptional circumstance that "good cause" is shown. When a state court holds that no "good cause" exists in a particular case, and yet the federal court may reach the claim as if the state-court procedural bar did not exist, the State has been undercut in its effort to channel this claim to the right place at the right time. Surely, federal habeas law should not penalize a State for adopting

[1] Perhaps concerned about this implication of its holding, the Sixth Circuit stated: "we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under [*Carrier*]." J.A. 61. Insofar as this sentence suggests that the Sixth Circuit's holding might apply only when a state court will entertain a "good cause" showing for a missed deadline, that suggestion would lead to the anomalous – and unacceptable – consequence that a state-court procedural bar is exempt from the federal cause-and-prejudice test *only when a state court specifically has found no "good cause" for the missed deadline*. This result would seem exactly backwards: when a state court has already determined that a prisoner has no adequate justification for missing a deadline, the federal court especially should honor that determination, unless the prisoner can meet the federal standard of cause-and-prejudice.

its own "good cause" exception to one of its own filing deadlines. Federalism and comity require that a State be permitted to create a safety valve to its procedural bar without fear that a federal habeas court will no longer respect that bar.

Far from "precluding federal courts from acting at all" (Resp. Br. at 11), our position would permit consideration of a defaulted ineffectiveness claim – both as a gateway and for its own sake – if a prisoner can either justify the default of this claim or show actual innocence. Our position appropriately respects the relevant federal and state interests when a prisoner has no cause for missing a state-court deadline and cannot show actual innocence, whereas Carpenter's position does not. All of this Court's past precedents – and the Court's longstanding concerns for "finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) – suggest that Carpenter should first show cause and prejudice for his failure to comply with Rule 26(B) before citing ineffective-assistance as the cause for his default of another habeas claim.

II. The Question Presented Is Properly Before The Court.

Carpenter asserts for the first time in his merit brief that the question is not properly before the Court. This assertion is incorrect.

Carpenter argues that the issue of a procedural bar's "adequacy" is antecedent to the issue whether there is cause for noncompliance with the State's procedure. This argument, however, misses the key point. The Sixth Circuit held the whole framework of procedural default analysis

inapplicable to Sixth Amendment claims asserted as cause for other defaults: "Principles of comity do not require placing a procedural default analysis on claims asserted as cause." J.A. 61.

Holding procedural default analysis altogether inapplicable is analytically antecedent to the issue of "adequacy," which is a subsidiary inquiry *within the framework of procedural default analysis*. Indeed, this is precisely why the Sixth Circuit never reached the adequacy issue decided by the district court. The Sixth Circuit cut the "adequacy" inquiry off at the pass – finding the entire procedural default analysis irrelevant. *See* J.A. 65 n.13. It is this holding that we have brought to the Court for review, and the correctness of that holding is properly before the Court, without any need to consider the "adequacy" issue first.

Though Carpenter claims that there has been no finding of procedural default in this case, he does not dispute, nor could he, that both the Ohio Court of Appeals and the Ohio Supreme Court did not consider the merits of his Sixth Amendment claim, relying on the state-law ground that it was unjustifiably late.[2] That fact is sufficient to put the question presented before this Court. In considering this analytic point, it is useful to remember that the procedural default doctrine is a species of the "independent and adequate state ground" doctrine. *Coleman*, 501 U.S. at 729. A court obviously need not test the adequacy of a state ground if, as

[2] As the Sixth Circuit itself acknowledged: "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." J.A. 60.

the Sixth Circuit held here, this entire doctrine does not apply at all in this particular context.

Indeed, Carpenter's claim that the holding of the Sixth Circuit is not ripe for review (without first addressing the adequacy of the state-court bar) is quite surprising, for Carpenter himself argued in the court of appeals that "the district court erred initially by determining that [his ineffective-assistance claim] must itself be subjected to a procedural default analysis before it may constitute cause." J.A. 58 (describing Carpenter's argument).[3] Having prevailed in contending that the applicability of procedural default analysis is analytically antecedent to the subsidiary issue of adequacy, Carpenter himself is now in no position to complain that this Court may not review the Sixth Circuit's holding because it did not first decide the adequacy issue. In any event, the important point is that the Sixth Circuit was right to consider *first* whether procedural default analysis applies at all, *before* considering any subsidiary issue (including adequacy) that is dependent on the answer to that *first* question. Although the Sixth Circuit answered this preliminary question incorrectly, the court of appeals was not wrong to start with it, and whether their answer should be affirmed or reversed is ripe for this Court's review.[4]

[3] In his Sixth Circuit brief, Carpenter argued that "the district court 'put the cart before the horse'" and that if his argument about the inapplicability of procedural default doctrine is correct "it will be unnecessary to reach the merits of the Warden's appeal [on the finding of inadequacy]." *See* Final Second Brief of Petitioner-Appellee/Cross-Appellant at p.18.

[4] Insofar as Carpenter objects to the particular phrasing of the question presented in our certiorari petition, we note that no such objection was raised in his brief in opposition, as required by this Court's Rule 15.2.

Contrary to Carpenter's suggestion, there is no jurisdictional or prudential barrier to a decision from this Court on the question whether or not procedural default analysis, like the exhaustion requirement, applies to Sixth Amendment claims asserted as cause. And for all the reasons that we have stated, the Sixth Circuit's holding conflicts with federal courts' otherwise uniform application of procedural default analysis and threatens the integrity of the exhaustion requirement adopted in *Carrier*. It is an aberration that has caught the well-deserved attention of 35 other States, each concerned that the court of appeals' errant approach not become binding on them. In short, the question presented is properly before the Court, it is an important one, and the Court should resolve it in this case.

III. This Court Should Either Remand Or Uphold The Adequacy Of The Procedural Bar.

If this Court reverses the judgment of the court of appeals, then the Court may remand the case for further proceedings, allowing the court of appeals to consider the "adequacy" of Ohio's Rule 26(B) as a procedural bar to Carpenter's ineffective-assistance claim. As the court of appeals explicitly acknowledged, it did not "reach the issue because of [its] ruling" on the question now before this Court. J.A. 65 n.13. Insofar as Carpenter asks this Court to reach the adequacy issue as an alternative ground, and if this Court does so, it should reject Carpenter's argument on the issue as untenable.

Ohio's Appellate Rule 26(B) provides that an ineffective-assistance-of-appellate-counsel claim "shall be filed . . . within ninety days . . . unless the applicant shows good cause for filing at a later time." Pet. Br. at 3. Once this Rule took effect on July 1, 1993, Carpenter was on notice

that he was obligated to file such a claim within 90 days, or else risk default of it. Arguably, he should have known even earlier that he risked default of this claim, for until Rule 26(B) took effect, prisoners wishing to raise ineffective-assistance-of-appellate-counsel claims in Ohio were required to do so within a 10-day deadline, absent "good cause" for filing later. *See State v. Murnahan*, 63 Ohio St. 3d 60, 66 & n.6, 584 N.E.2d 1204, 1209 & n. 6 (1992). In any event, by filing a Rule 26(B) application a full year after that Rule's 90-day deadline took effect, Carpenter clearly missed the State's deadline for raising his ineffective-assistance claim.

The Ohio Court of Appeals' holding that Carpenter had not shown "good cause" for his untimely filing makes perfect sense, for being present at his guilty plea hearing, he knew how the prosecution had presented its factual statement in support of the plea and thus should have known immediately whether his appellate lawyer acted contrary to his interests in failing to challenge that plea on direct appeal. J.A. 19-20. Carpenter *wanted* to plead guilty in 1990, making the choice to forgo a trial rather than face a possible death penalty. If he wanted to undo this choice, based on the procedures at his plea hearing, he should have said so by the end of his direct appeal or soon thereafter, as Ohio's rules required. Yet, as did the prisoner in *Alford*, Carpenter "now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of [capital] murder," *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970), and he brings that argument to federal court after having missed the State's deadline for raising it there first.[5]

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[5] *See also Mabry v. Johnson*, 467 U.S. 504, 508 (1984) ("It is well settled that a voluntary and intelligent plea of guilty made by an

The federal district court in this case held the state-court bar inadequate because, in its view, Ohio's intermediate appellate courts had been inconsistent in their interpretation of the Rule 26(B) "good cause" standard. J.A. 42-43. Yet that view would condemn the *Wainwright v. Sykes* "cause" standard itself, especially insofar it applies to bar defaulted claims by federal prisoners in section 2255 proceedings.[6] Under *Sykes* itself, the federal courts of appeals certainly have differed in their application of the "cause" standard to particular fact-patterns, and this Court does not always intervene immediately to resolve such circuit conflicts.[7] In fact, over twenty years after *Sykes*, the Court reiterated that it has "left open for resolution in future decisions the precise definition of cause and prejudice." *Dugger v. Adams*, 489 U.S. 401, 406-07 (1989) (internal quotations omitted). Surely, Ohio's 90-day deadline is not rendered inadequate just because it contains a measure of leniency that has

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accused person, who has been advised by competent counsel, may not be collaterally attacked.")

[6] *See United States v. Frady*, 456 U.S. 152, 167 (1982); *accord Bousley v. United States*, 523 U.S. 614 (1998) (applying this standard when, like Carpenter, a defendant challenged only his sentence and not his guilty plea).

[7] *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 1090-1108 (vol. 2) (3d ed. 1998), which describes various tensions among circuit courts in interpreting "cause," including (at 1095 n.28) a split among three 1989 cases involving the specific question whether a prisoner can establish cause for a defaulted *Brady* claim when the prisoner knew or reasonably could have learned of the undisclosed materials – a question this Court explicitly left unresolved last year in *Strickler* (*see* 119 S. Ct. at 1951 n.33). *See also* Liebman & Hertz, *supra*, at 1105-06 n.43 (describing decade-old, but post-*Carrier*, circuit conflict on when a prisoner's *pro se* status can constitute "cause" for a default).

generated some interpretive differences among the State's intermediate appellate courts.

Moreover, none of the cases cited by the district court support its holding of inadequacy. *Ford v. Georgia*, 498 U.S. 411 (1991), concerned the retroactive application of a judicial decision that could not have been reasonably anticipated, not a promulgated filing deadline adopted a year before its application to the case at hand. *See id.* at 419-24 (state-court rule for *Batson*, but not *Swain*, claims unforeseeable). *James v. Kentucky*, 466 U.S. 341 (1984), involved a rather arcane, unclear, and irregularly-followed state-law distinction between jury "instructions" and "admonitions," which made it exceedingly difficult for counsel in the midst of a fast-moving trial to know which "magic word" to use when asking the judge to tell the jury not to draw an adverse inference from the defendant's failure to testify. *See id.* at 349-51. By contrast, whatever imprecision exists in the phrase "good cause," that phrase is directed solely to the conduct of the *court* and not the Rule 26(B) *applicant*, and thus generates no uncertainty concerning the prisoner's obligation to file within 90 days, or else risk default.[8]

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[8] *Barr v. City of Columbia*, 378 U.S. 146 (1964), and *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964), are even further afield. In *Barr*, the Supreme Court of South Carolina refused to rule on two objections to sit-in convictions on the ground that the objections were "too general to be considered," although in four other cases within the same three-month (including one decided just the day before) the court ruled on the exact same objections. *See Barr*, 378 U.S. at 149-50. In *NAACP*, the Alabama Supreme Court refused to consider arguments raised in a brief because they were grouped together in five subparts for the convenience of the reader, although the court's rules and prior decisions gave no

Perhaps recognizing the weakness of the district court's finding of inadequacy, Carpenter offers the alternative observation that, between 1993 and 1996, a then-existing Ohio Supreme Court rule made it impossible to file a Rule 26(B) application while simultaneously pursuing review of a direct appeal in the Ohio Supreme Court. Yet Carpenter himself did not file for review of his convictions and sentence in the Ohio Supreme Court and never sought review of his ineffective-assistance claim until more than three years after losing his direct appeal, and more than one year after Rule 26(B)'s 90-day rule took effect. Nothing in the Ohio Supreme Court's rules prevented Carpenter from filing earlier, and so those rules do not render inadequate the state-court bar of Carpenter's untimely application.

Far from condemning this bar as inadequate, a federal habeas court should honor it as controlling. At bottom, this case is one in which a defendant pleaded guilty in order to avoid a possible death penalty if he went to trial. Yet more than three years after completion of his direct appeal, he raised the claim that his appellate lawyer should have challenged the validity of the plea on the ground that the prosecution should have established the factual basis for the plea through sworn testimony instead of the prosecution's own statement of the available evidence. When the state courts have found this claim too late for review in accordance with state procedures, the federal courts likewise should find the claim time-barred, unless the prisoner can meet the federal standard of cause-and-prejudice. As this Court has repeatedly observed, "'the concern with finality served by

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indication of prohibiting this stylistic practice. *See NAACP*, 377 U.S. at 293-301.

the limitation on collateral attack has special force with respect to convictions based on guilty pleas.'" *Bousley v. United States*, 118 S. Ct. 1604, 1610 (1998), quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979).[9]

CONCLUSION

For the reasons explained here and in our opening brief, the Court should reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted,

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February 2000

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[9] The merits of neither Carpenter's "illegal plea" claim nor his ineffective-assistance claim are before this Court. We note, however, that we do not accept Carpenter's assertions that these claims are meritorious and, if necessary, on remand would press our arguments on these points.

Dec 22 1999

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No. 98-2060

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,
v.
ROBERT W. CARPENTER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI CURIAE* INTEREST

Texas, and the 34 other states that join in this brief, urge the Court to reverse the decision of the Sixth Circuit in *Carpenter v. Mohr*, 163 F.3d 938, 945-46 (CA6 1998), *cert. granted sub nom. Edwards v. Carpenter*, 120 S.Ct. 444 (U.S. Nov. 8, 1999) (No. 98-2060). This case presents an important question affecting the states' interest in the finality of state criminal convictions. At issue is whether a federal court reviewing a writ of habeas corpus is barred from considering an ineffective assistance of counsel claim as "cause" for the procedural default of another claim when the ineffective assistance claim itself is procedurally defaulted.

The Sixth Circuit's decision overlooks long-settled precedent requiring that it conduct a "cause" and "prejudice" analysis on the defaulted ineffective assistance claim before using the ineffective assistance of counsel claim as "cause" for another procedurally defaulted claim. Its argument that the Supreme Court was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for a procedurally defaulted independent issue misinterprets the Court's precedent regarding procedural bars in federal court.

Because the court of appeals has effectively ruled that procedurally defaulted ineffective assistance of counsel claims will be resurrected in federal court to serve as "cause" for other procedurally defaulted claims, a petitioner can knowingly choose to default claims in state

court in hopes that a federal court will accord more favorable review of his federal claims. This creates a risk of forum-shopping for constitutional claims, undermines the states' legitimate interests in having the first opportunity to right their mistakes, and thus offends state sovereignty.

The Sixth Circuit's decision undercuts long-standing principles of comity. If left standing, the court of appeals's opinion opens the doors to a flood of federal habeas litigation. Based on this decision, habeas petitioners can return to state court and file abusive state writs alleging a laundry list of ineffective assistance of counsel claims and bootstrap those claims to other claims that have already been procedurally defaulted.

One of the purposes of the procedural default doctrine is to acknowledge the binding nature of state rules of procedure that preclude independent review by federal courts. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). In addressing a claim that has been procedurally defaulted in state court, a federal court shows a complete disregard for state procedural rules. Repeatedly, the Court has "emphasized the important interests served by state procedural rules at every stage of the judicial process and the harm to the states that results when federal courts ignore these rules." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991). Indeed, the Court has recognized that "[a] State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). *Amici* have a strong interest in ensuring that their procedural rules are accorded proper deference by federal courts.

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Amici file this brief because this case presents an issue of importance to the states. The Sixth Circuit's decision makes the states highly susceptible to a new flow of federal habeas litigation, reopening claims that are barred. The Court should reverse because allowing habeas corpus petitioners to revive procedurally defaulted claims with another procedurally defaulted claim violates principles of state sovereignty.

SUMMARY OF THE ARGUMENT

A federal court reviewing a state prisoner's habeas corpus petition must respect a state court's determination that a particular claim is procedurally barred under state law. *Wainwright*, 433 U.S. at 90-91. When the state court has "clearly and expressly" stated that its judgment rests on a state procedural bar, a presumption arises that the state court decision rests on independent and adequate state law grounds. *Harris v. Reed*, 489 U.S. 255, 263 (1989). The purpose behind the independent and adequate state law doctrine is "to accord appropriate respect to the sovereignty of the [s]tates in our federal system." *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 154 (1979). Consequently, a federal court's disregard for a state procedural default greatly taxes the states because it: 1) improperly threatens the finality of criminal convictions; and 2) frustrates the states' good faith efforts to honor constitutional rights and their sovereign power to punish criminal offenders. *Murray*, 477 U.S. at 487; *Coleman*, 501 U.S. at 748. Because the Sixth Circuit's decision violates the fundamental principles of federalism, it should be reversed.

ARGUMENT

I. THE PROCEDURAL DEFAULT DOCTRINE IS FOUNDED ON PRINCIPLES OF COMITY AND FEDERALISM.

The Sixth Circuit's conclusion that "[p]rinciples of comity do not require placing a procedural default analysis on claims asserted as cause" misinterprets this Court's procedural default jurisprudence. It is true that the doctrines of exhaustion and procedural default are distinct, but they share a common foundation of long-standing principles of federalism. *Murray*, 477 U.S. at 495 ("[T]he principles of comity and finality . . . inform the concepts of cause and prejudice."); *see also Wainwright*, 433 U.S. at 81 ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."); *Coleman*, 501 U.S. at 731 ("[T]his exhaustion requirement is also grounded in principles of comity."); *Picard v. Connor*, 404 U.S. 270, 275 (1971) ("Comity is the underlying rationale for the exhaustion requirement.").

The court of appeals wrongly concluded that merely imposing the exhaustion requirement on claims asserted as "cause" for a procedural default sufficiently ensures that the state court has had the first opportunity to review the claims. *Carpenter*, 163 F.3d at 945. In fact, a claim that is procedurally defaulted is not reviewed on the merits by the state courts. This Court explicitly founded the procedural default doctrine on principles of comity and federalism. *Coleman*, 501 U.S. at 730. *Harris* explicitly established the adequate and independent state ground

doctrine to demonstrate respect for state procedural rules. 489 U.S. at 264. Like a petitioner who has failed to exhaust state court remedies, a petitioner who has procedurally defaulted his claims in state court has deprived the state of the opportunity to review those claims. *Coleman*, 501 U.S. at 732.

The doctrine of exhaustion is a statutory prerequisite to obtaining federal habeas review of a constitutional claim. 28 U.S.C. §2254(b) (1999). Similarly, the doctrine of procedural default is a common-law condition precedent to federal habeas review. *Murray*, 477 U.S. at 517 (Brennan, J., dissenting); *see also Harris*, 489 U.S. at 259. These two requirements must be independently met before a federal court will review a federal claim that was first presented to the state courts. Consequently, the Sixth Circuit was wrong in holding that "[t]here is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim." *Carpenter*, 163 F.3d at 945. Federalism concerns demand that a federal court abstain from reviewing a claim when the state court relied on a procedural bar for dismissing the same claim. *Coleman*, 501 U.S. at 729-30.

II. THE PROCEDURAL DEFAULT DOCTRINE DICTATES A "CAUSE AND PREJUDICE" ANALYSIS ON ALL CLAIMS PROCEDURALLY DEFAULTED IN STATE COURT.

A procedural default occurs when a criminal defendant fails to comply with a state procedural rule. *Wainwright*, 433 U.S. at 82-84. Generally, a state court

will not review the merits of a procedurally defaulted claim, and a federal court is likewise barred from addressing the merits of the claim. *Id.* In finding that a habeas petitioner can use a procedurally defaulted ineffective assistance of counsel claim as cause for the procedural default of another claim, the court of appeals erroneously opened the federal courthouse doors to state prisoners with defaulted claims. This Court's decisions in *Wainwright*, *Murray*, *Harris*, and *Coleman* compel a cause and prejudice analysis on a procedurally defaulted ineffective assistance of counsel claim before it can serve as "cause" for another procedurally defaulted claim.

In *Wainwright*, the Court held that to obtain federal habeas review of a constitutional claim that has been procedurally defaulted under state rules, a petitioner must show cause for the default and resultant prejudice. 433 U.S. at 87. The Court explicitly left open the question of the "precise definition of the 'cause'-and-'prejudice' standard." *Id.* at 87-91. This open question was revisited in *Murray*.

In *Murray*, the habeas petitioner, Carrier, procedurally defaulted his claim that the trial court erred in denying his discovery request for the victim's statements because he failed to present the issue on direct appeal. 477 U.S. at 482-83. Carrier raised the discovery claim for the first time in his *pro se* state habeas petition. The state trial court dismissed the claim based on the procedural default, and the Virginia Supreme Court denied certiorari. Carrier raised the issue in his federal petition, which the federal district court dismissed as procedurally barred. On appeal,

Carrier argued that counsel had mistakenly omitted the claim on direct appeal and that this error was "cause" for the procedural default. The court of appeals reversed and remanded, holding that a petitioner need only show that a procedural default was due to counsel's "ignorance or inadvertence rather than from a deliberate tactical decision." This Court decided that the court of appeals's standard was incorrect.

Carrier asked the Court to establish a lesser standard of counsel error, *i.e.*, mistake or inadvertence, to serve as "cause" for a procedural default on appeal. *Id.* at 490. The Court flatly rejected that proposition and held that only constitutionally deficient performance could constitute cause for a procedural default. *Id.* at 492. The Court held that constitutionally ineffective assistance of counsel as established in *Strickland v. Washington*, 466 U.S. 668 (1984), can serve as "cause" for a procedural default of another claim if the ineffective assistance of counsel claim was independently raised in state court. *Murray*, 477 U.S. at 488-89.

Carrier had not raised an independent claim of ineffective assistance of counsel in state court. In fact, the Court found that Carrier "disavowed any claim that counsel's performance on appeal was so deficient as to make out an ineffective assistance claim." *Id.* at 497. Consequently, because the Court found that Carrier was not raising an ineffective assistance of counsel claim for the default of his discovery issue, Carrier could not establish "cause" and the discovery claim was procedurally barred. *Id.*

In *Harris*, the Court found that federal habeas review of the petitioner's ineffective assistance claim was not precluded because the state appellate court, although mentioning a state procedural default, had addressed the substantive merits in rejecting the claim. 489 U.S. at 266. The Court held that "[a] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id.* at 263. In other words, *Harris* established a presumption against an adequate and independent state law ground to support the state's decision when the last state court fails to explicitly state its reliance on a procedural default.

In *Coleman*, the petitioner filed an untimely notice of appeal from the state habeas court's adverse ruling. 501 U.S. at 727. The state moved to dismiss the appeal on the ground that the notice of appeal had not been filed within the time prescribed by a state procedural rule. *Id.* at 727-28. "Upon consideration" of the state's motion to dismiss and other pleadings filed, the state supreme court dismissed the appeal. *Id.* Because the state's motion to dismiss was based solely upon the state's procedural rule, this Court found that the state supreme court's dismissal appeared to rest primarily on state law. *Id.* at 740-44. Thus, the *Harris* presumption against adequate and independent state grounds did not apply and the federal habeas court was barred from reviewing the claims presented in the state habeas proceeding. *Id.* at 729-30, 740-44.

Here, however, the Sixth Circuit disregarded the state's procedural rules. Under the court of appeals's opinion, a defaulted ineffective assistance of counsel claim can be resurrected in federal court by serving as "cause" for other independently procedurally defaulted claims. Acceptance of the Sixth Circuit's interpretation of *Murray* would subvert the important interests of finality, comity, and federalism underlying the Court's procedural default jurisprudence.

The Sixth Circuit's interpretation of this Court's precedent is unfounded. The court of appeals concluded that *Murray* was merely concerned with exhaustion of an ineffective assistance of counsel claim before it could serve as "cause" for another procedurally defaulted claim. *Carpenter*, 163 F.3d at 944. While it is true that *Murray* stated that an ineffective assistance of counsel claim would need to be presented as an independent claim to the state courts before it could serve as "cause" for a separate procedurally defaulted claim, the Court did not decide whether a procedurally defaulted ineffective assistance of counsel claim could serve as "cause." 477 U.S. at 489. Indeed, in *Murray*, the petitioner was not even alleging an ineffective assistance of counsel claim. 477 U.S. at 483, 497. *Murray* cannot be interpreted in a vacuum. It must be considered in conjunction with the Court's other procedural default cases, *i.e.*, *Wainwright*, *Harris*, and *Coleman*.

The Sixth Circuit held that *Murray* did not impose a procedural default requirement for claims asserted as "cause," and thus, refused to apply a cause and prejudice

analysis on the defaulted ineffective assistance of counsel claim. The court of appeals's reasoning ignores the states' legitimate interest in the finality of their convictions and undermines the states' right to punish criminal defendants. *Coleman*, 501 U.S. at 748. Although *Wainwright*, *Harris*, and *Coleman*, did not directly address whether a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted constitutional claim, the Sixth Circuit's rationale is inconsistent with the Court's reasoning in those cases.[1]

III. A FEDERAL COURT CANNOT IGNORE A PROCEDURAL DEFAULT IN STATE COURT.

It is firmly established that a federal court cannot review a claim that has been explicitly ruled procedurally barred by the state's highest court considering the claim. *Harris*, 489 U.S. at 261-62; *Coleman*, 501 U.S. at 729-30. When a state court explicitly relies on a procedural bar to deny relief, a state prisoner may not obtain federal habeas

1. In a recent opinion, the Court stated that an ineffective assistance of counsel claim could not serve as "cause" for the procedural default of an Eighth Amendment claim because "the ineffective assistance of counsel [was], itself, procedurally defaulted." *Stewart v. LaGrand*, 119 S.Ct. 1018, 1021 (1999). Also, the Court indicated that the defaulted ineffective assistance claim was subject to the "cause and prejudice" standard. *Id.* Although the Court did not refer to any prior procedural default cases, the Court's reasoning in *Stewart* directly contradicts the Sixth Circuit's reasoning. The Court should remove any uncertainty as to its holding in *Stewart*, and reaffirm the independent and adequate state ground doctrine.

relief unless he can demonstrate cause for the default and actual prejudice attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of justice. *Coleman*, 501 U.S. at 750; *Wainwright*, 433 U.S. at 87.

Murray established that when counsel is ineffective under the standard of *Strickland*, this may serve as "cause" within the meaning of *Wainwright*. 477 U.S. at 488-89. Also, *Coleman* reiterated that "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." 501 U.S. at 755. Therefore, an ineffective assistance of counsel claim cannot serve as "cause" for the procedural default of another claim unless counsel's performance was constitutionally deficient and resulted in prejudice. *Murray*, 477 U.S. at 492. Although the Court has cautioned that an ineffective assistance of counsel claim must have first been presented to the state courts as an independent claim in order for it to serve as "cause" in a federal court proceeding, it has not explicitly answered whether a procedurally defaulted ineffective assistance of counsel claim may serve as "cause." Logically, it should not.

Before finding that an ineffective assistance of counsel claim constitutes "cause" for another procedurally defaulted claim, a federal court must find that counsel's performance was constitutionally deficient. *Coleman*, 501 U.S. at 755. When a federal court independently addresses the merits of a procedurally defaulted ineffective assistance of counsel claim, it is reviewing a claim that the state courts never addressed. The court of appeals

acknowledged that independent review of the ineffective assistance of counsel claim was barred because the claim was defaulted in state court, yet it found that *Murray* creates an exception and allows the claim to serve as "cause" for another procedurally defaulted claim. *Carpenter*, 163 F.3d at 945 ("There is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim.").

The court of appeals's reasoning defies logic. In this case, the state court's denial of relief was based on a state procedural default. *Carpenter*, 163 F.3d at 942. By failing to satisfy state procedural requirements, Carpenter forfeited his right to review of the merits of his federal claim. The court of appeals's opinion overlooks well-established precedent requiring that it conduct a "cause" and "prejudice" analysis on Carpenter's defaulted claim before using the ineffective assistance of counsel claim as "cause" for another defaulted claim.[2]

Because Carpenter's claim was dismissed on an independent and adequate state law ground, "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729. In fact, the procedural history of this case emphasizes the fundamental wisdom of

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2. In contrast, the district court did apply a cause and prejudice analysis to the defaulted ineffective assistance of counsel claim. *Carpenter*, 163 F.3d at 943. The district court's analysis is consistent with procedural bar jurisprudence.

barring federal habeas review based on an independent and adequate state ground of decision. The state courts never addressed Carpenter's constitutional complaint of ineffective assistance of appellate counsel because he failed to raise it in a procedurally correct manner. By deciding the issue, the court of appeals decided an issue that the state courts never considered and, potentially, gave an award of relief broader than this Court could have permitted on direct review of the conviction. Those actions were inappropriate for a court bound by federalism and comity.

IV. THE PRINCIPLES OF FEDERALISM DICTATE THAT A FEDERAL COURT SHOULD RESPECT THE STATES' INTERESTS IN ENFORCEMENT OF THEIR PROCEDURAL RULES.

The Sixth Circuit's conclusion that a procedurally defaulted ineffective assistance of counsel claim can serve as "cause" for another defaulted claim adds confusion to the procedural default doctrine. On review of Carpenter's federal habeas petition, the district court applied a cause and prejudice analysis to Carpenter's defaulted ineffective assistance of counsel claim. *Carpenter*, 163 F.3d at 943-44. On appeal Carpenter successfully argued that the district court erred because *Murray* "only imposed an exhaustion requirement on the cause asserted by the habeas petitioner in connection with the procedural default of the primary habeas claim." *Carpenter*, 163 F.3d at 944.

The Sixth Circuit's decision fails to properly respect Ohio's state procedural rules. In *Reed v. Ross*, 468 U.S. 1, 10 (1984), the Court admonished federal courts to respect

a state court's finding of procedural default under its own laws:

> "The State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . would be undermined if the federal courts were too free to ignore procedural forfeitures in state court." *Id.*

The Sixth Circuit's understanding of *Murray*, *i.e.*, only requiring an ineffective assistance of counsel claim to be raised independently in state court to satisfy the principles of comity, misses the point of the Court's concerns. *Carpenter*, 163 F.3d at 944. *Murray*'s concern with comity was based on giving the states the first opportunity to review and decide the merits of a constitutional claim. 477 U.S. at 489. When a claim raised in state court is found to be procedurally defaulted because of a failure to comply with the state's procedural rules, it is exhausted and procedurally defaulted. The state courts do not review the merits of a procedurally defaulted claim.

The Sixth Circuit determined that Carpenter's ineffective assistance of counsel claim was meritorious and was sufficient "cause" to overcome his procedurally defaulted sufficiency of the evidence claim. *Carpenter*, 163 F.3d at 947. A finding of constitutionally ineffective assistance of counsel is a decision on the merits. Thus, the Sixth Circuit's review of the ineffective assistance of counsel claim circumvents the Ohio state court's finding of a procedural default.

The Sixth Circuit's decision resurrects Carpenter's ineffective assistance of counsel claim after that procedurally defaulted claim was dead and gone in state court. To further add insult to injury, the federal court has determined that Carpenter is entitled to relief unless the state court holds a new culpability hearing. *Carpenter*, 163 F.3d at 948. These actions exemplify the harm to the states when federal courts ignore state procedural rules. The "cause and prejudice" standard established in *Coleman* signifies far greater respect for state procedural rules and should be applied to a procedurally defaulted ineffective assistance of counsel claim before it can serve as "cause" for another procedurally defaulted claim.

Other lower courts have faced this double-default dilemna and recognized that principles of comity require a federal court to respect a state procedural default. In *Justus v. Murray*, 897 F.2d 709, 714 (CA4 1990), the Fourth Circuit held that *Wainwright* and *Harris* compel a "cause and prejudice" analysis before a procedurally defaulted ineffective assistance of counsel claim can serve as cause for another procedurally defaulted claim. *Id.* at 713. The court of appeals explicitly stated:

> "[C]laims of ineffective assistance of counsel, like other constitutional claims, may be precluded from federal habeas review if they have been rejected in state court on the adequate and independent state ground of a violation of a state procedural rule." *Id.* at 712 (citations omitted).

Moreover, the court recognized that to review the merits

of a procedurally defaulted ineffective assistance of counsel claim would bypass the state procedural bar. *Id.* at 713. The court recognized that such a result does not square with the principles of finality, comity, and judicial efficiency that underlie this Court's procedural default jurisprudence. *Id.*

Similarly, in *Hill v. Jones*, 81 F.3d 1015, 1030 (CA11 1996), *cert. denied*, 519 U.S. 1119 (1997), the Eleventh Circuit flatly rejected petitioner's argument that *Murray* allows an ineffective assistance of counsel claim to serve as "cause" whenever the claim is exhausted as an independent claim regardless of whether it is also procedurally defaulted. *Id.* at 1029. The court concluded that *Murray* and "the rest of the Supreme Court's jurisprudence on procedural default dictate that procedurally defaulted claims of ineffective assistance cannot serve as cause to excuse a default of a second claim." *Id.* at 1030. "Instead, [*Murray*] requires a claim of ineffective assistance be both exhausted and not defaulted in state court before it can be asserted as cause." *Id.* at 1031.

In juxtaposition to the Sixth Circuit's decision, these cases show a proper understanding of the Court's exhaustion and procedural default jurisprudence and proper deference to longstanding principles of finality, comity, and judicial economy. Because the state pays a

high price[3] when a federal court reviews a claim that is barred by the state courts, the Court should not let the Sixth Circuit's decision stand. The reasoning employed by the lower court is fundamentally flawed and will undermine a long history of respect for the states' procedural rules.

CONCLUSION

For these reasons, *Amici* respectfully submit that the court of appeals's decision should be reversed.

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3. As the Court stated in *Coleman*:

"[M]ost of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction." 501 U.S. at 738-39.

Respectfully submitted,

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